92-2017

Supreme Court, U.S.
FILED
JUN 21 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

October Term 1992

No.

WILLIAM J. CLEARY, JR.,

Petitioner,

v.

ROBERT WASSERWALD, INC., and
ROBERT WASSERWALD, INDIVIDUALLY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO REVIEW AN OPINION OF THE COURT OF APPEAL
SECOND APPELLATE DISTRICT,
DIVISION TWO,
STATE OF CALIFORNIA

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QUESTIONS PRESENTED FOR REVIEW

1.) Where the I.R.S. determines that an independent contractor is in fact an employee, does the employee have a cause of action for indemnity against the employer for his share of the F.I.C.A. tax otherwise assessed against the employee as a self-employment tax? Can the employee compel the employer to pay to the I.R.S. the employer share of the F.I.C.A.?

2.) Does the Americans with Disabilities Act (42 U.S.C. Section 12101, et seq.) apply to state court actions pending on its effective date where the action's gist alleges a violation of the Act?

3.) Where under state tort law a cause of action for wrongful termination and breach of the implied covenant of good faith and fair dealing may be asserted when there a breach of public policy, must not

the state court consider the policy embodied in the Americans with Disabilities Act in deciding whether there was a breach of public policy?

4.) Where state statutes require the employer to provide the employee with unemployment insurance, state disability insurance and worker's compensation insurance, do not the Due Process and Equal Protection clauses of the Fourteenth Amendment require state courts to recognize a cause of action for damages against the employer for his violation of the statutory obligations?

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OPINIONS BELOW

(R. 14.1(d)

The opinion of the Court of Appeal is not officially reported but it is reproduced in the Appendix at page 1. The California Supreme Court denied review on April 14, 1993 without further opinion. (Append. p.20).

JURISDICTION

Jurisdiction of this court is based on 28 U.S.C. Section 1257 which permits petitions to this court where "any title, right, privilege or immunity is specially set up or claimed under the Constitution...or statutes of...the United States."

The complaint here sought recovery

of taxes made the personal liability of the employer by I.R.C Sections 3101, 3111, and 6672. In fact, while the case was pending, the I.R.S. determined by letter of July 23, 1992 that petitioner was respondent's employee for federal tax purposes. (Append. p. 21). The complaint was nonetheless dismissed, which was affirmed by the Court of Appeal on January 29, 1993. A petition for review to the state Supreme Court was denied on April 14, 1993.

Jurisdiction over the remaining questions is claimed under 28 U.S.C. Section 2106. (Vance v. Terrazas 444 U.S. 252, 258-259, N.5 (1980) which grants the court jurisdiction over issues not raised below where some federal question is specifically raised.) Jurisdiction is also claimed under the Plain Error Rule of this Court. (R.24.1(a).)

Jurisdiction, furthermore, is claimed under the Americans with

Disabilities Act, effective July 26, 1992, which pre-empted state law under which the Court of Appeal rendered the decision on January 29, 1993. (See, 29 C.F.R. Section 1603.1(c)(2). Hence, the Court of Appeal was without subject matter jurisdiction to decide the case under state law. The Supremacy Clause of Article VI states that federal law binds state court judges. As the self-executing provision of the Judicial Power Clause vests this court with jurisdiction to review all cases arising under Federal Law, jurisdiction is, then, claimed under Article III, Sections 1 and 2.

Constitutions, Statutes and Regulations

The following texts are summarized here. They are set out verbatim in the Appendix. (Append. pp 35-49)

1.) I.R.C. Section 3101 imposes a retirement and disability tax on the wages of all employees. This is an income tax, known as FICA.

2.) I.R.C. Section 3102 requires the employer to collect the employees' FICA tax by withholding it from wages paid.

3.) I.R.C. Section 3111 imposes an excise tax on the employer equal to the amount paid by the employee for retirement and disability under Section 3101. This is also part of the F.I.C.A. tax.

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4.) I.R.C. Section 3402 requires the employer to deduct and withhold the employee's income tax.

5.) I.R.C. Section 6672 provides that the employer shall be 100% liable for any tax he should but does not withhold.

6.) The Americans with Disabilities Act (ADA) (42 U.S.C. 12101 et seq.) provides that employers cannot discriminate against qualified disabled employees in promotion or discharge, or other "terms, conditions, and privileges of employment." (42 U.S.C. 12112(a))

7.) 29 C.F.R. Section 1630.1 et seq. provides that the ADA pre-empts state tort law to the extent that it does not provide remedies equal to or greater than the ADA.

8.) The ADA was enacted on July 26, 1990, effective July 26, 1992. (Statutory note, 42 U.S.C. Section 12111.) But certain sections took effect immediately upon passage, such as 42 U.S.C. Sections 12116, 12117, effective date to the contrary notwithstanding.

9.) California Labor Code Sections 3706, 3708 provide that an employee shall have an action at law against the employer when the employer does not provide worker's compensation insurance for the employee. In such an action, the employer's negligence is presumed, and the bars of contributory negligence and assumption of risk are unavailable.

10.) The Supremacy Clause provides that federal law shall bind state court judges.

11.) The Fourteenth Amendment provides that no state shall deprive any person of Due Process of law or of its Equal Protection.

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Statement Of The Case

I.

Petitioner Cleary sued respondent Wasserwald for indemnity for income taxes the I.R.S. retroactively assessed Cleary. Cleary, a lawyer, had worked for Wasserwald's law firm for about 7 years before being terminated. The action, brought in the California Superior Court, alleged that the I.R.S. had filed a lien for taxes it retroactively assessed Cleary based on his self-employment as an independent contractor for Wasserwald. Cleary alleged that he was an employee of Wasserwald's, not an independent contractor, and that Wasserwald should indemnify Cleary for the self-employment tax, an amount equal to the employer share of the F.I.C.A. excise tax that Wasserwald should have paid in the first place. The complaint also alleged that the lien had impaired Cleary's credit so that he could not open credit accounts, a

fact documented in the trial court, and for which damages were sought.

The trial court, after several demurrers, dismissed the complaint, and the Court of Appeal affirmed. While the appeal was pending, however, the I.R.S. in a letter determination decided in Cleary's favor, concluding in fact Cleary was an employee, not an independent contractor, for purposes of the Federal Insurance Contribution Act, the Federal Unemployment Tax Act, and for Collection of Income Tax at Source of Wages. (Append.p. 6.) Yet the Court of Appeal held that Cleary "acquiesced" in Wasserwald's misclassification and denied the count for indemnity and for damages as well.[2] In finally disposing of this count, the state court distinguished Bloom v. U.S.,

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[2] I.R.C. Section 3102(b) provides for employer indemnification where the F.I.C.A. excise tax is paid. There is no similar provision for employee indemnification where the employer does not pay the tax.

272 F.2d 215 (9 Cir. 1959), widely cited for the proposition that an employer is personally liable for 100% of his employee's federal taxes, on the ground that in Bloom the taxes had been withheld whereas here they had not been. That is, the court holds the employer liable for taxes he withholds, but not for taxes he should withhold but does not! That a compound violation of the tax law is preferred to a single, component violation is the court's inescapable conclusion. But see, I.R.C. Section 6672(a) which makes the employer 100% liable for taxes he should withhold but does not. And see I.R.C. Section 3102(a) which directs the employer to withhold the employee's share of the FICA tax. The rubbing point is still that the employer has unfairly shifted his tax liability (I.R.C. Section 3111(a) - an excise tax, for which the employee could not be liable) onto the employee's shoulders in the form of a transmuted income tax. So,

the Court of Appeal's opinion essentially holds that acquiescence in the employer's failure to pay his excise tax renders the employee liable for it as an self-employment tax. (The rates are identical, 7.5%.) The argument fails because the syllogism contains a non sequitur, a logical fallacy which equates an employee self-employment tax with an employer excise tax. (Cf. Aldisert, Logic for Lawyers, p. 198 (1990).) And, besides it is manifestly unfair to shift a tax imposed upon the employer for the employee's benefit onto the employee as the employee's liability.

Finally, the Court of Appeal, in disposing of the I.R.S.'s letter, holds that "[the letter] did not relieve [Cleary] of his duty either to pay income taxes as a self-employed individual or insist on being paid with proper withholding during the period he was employed by [Wasserwald]." (Append. p. 12). This is what Judge

Aldisert terms ignoratio elenchi (ignorance of the question) because even if Wasserwald had withheld Cleary's income tax, it would still have left Wasserwald personally liable for the employer's excise tax, over which Cleary could have no control and which by its nature is not withheld. It is this excise tax that Wasserwald seeks to evade by employing the device of independent contractor, a tax no amount of acquiescence can alter, and which tax he perversely converts from an employee benefit into an employee liability. If Zoe Baird, the beleaguered nominee for attorney general, must pay this tax, why should not Wasserwald.

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II.

Almost egregious as the above, which in truth prompted the action, is the Court of Appeal's disposition of the remaining counts of the complaint, the dismissal of which it affirms. In conformity with state law, Cleary pleaded additional causes of action for negligent infliction of mental distress and breach of the covenant of good faith and fair dealing, implied by state law in every contract, and for punitive damages.

Cleary alleged that he came to California from New Jersey where he had practiced law for 10 years. After passing the California Bar, he was hired in 1982 as an associate by respondent, who had a large plaintiff's personal injury practice employing well over 25 employees. Cleary, who had been previously hospitalized for mental and emotional problems, was nonetheless hired by Wasserwald, who also holds a psychology degree from U.C.L.A., at

the annual salary of $18,000. Wasserwald learned of these earlier breakdowns, and, indeed, Cleary was hospitalized for one during the early years of employment and about which Wasserwald also knew. The complaint continued that Wasserwald, over the course of Cleary's 7 year tenure with him, hired over 10 attorneys all at significantly higher salaries ($40,000, the entry level for Los Angeles, and higher). None of these attorneys stayed with Wasserwald more than a matter of months, except for Wasserwald's partner, Alvin Boatner, who was later disbarred. (In fact, two other associates from this period, Larry Cheshier and Mark Krueger both resigned with prejudice from the bar with charges pending.) Concerned about the "revolving door" nature of the employment, Cleary inquired about his status and Wasserwald assured him that he "could stay as long as you want."

Additionally, Wasserwald hired high school graduates as "adjusters," whom he paid more than Cleary. Indeed, he hired at least two disbarred lawyers, placed them in authority over Cleary, and paid them both significantly larger salaries.

Towards the end of the employment (December 1989), Cleary began to experience bouts of depression and demoralization which negatively affected his job performance, at least in Wasserwald's eyes. Wasserwald commenced a prolonged period of daily harassment, public berating, baiting, technical battery, the requiring of doctor's letters, the requiring of attendance at the office without being paid, and, despite obvious disability, the requiring of written assignments which, unilaterally, he paid by the piece, some days paying nothing. Promises of raises never materialized and Cleary made less in his last year than in his first, 7 years earlier.

Finally, Wasserwald fired Cleary in December 1989, and when Cleary applied for state disability and unemployment benefits they were denied because Wasserwald carried Cleary as an independent contractor, not an employee. For similar reasons, Cleary did not file a worker's compensation claim, knowing that there was no insurance for him. This is all in violation of applicable state statutes.

About 11 months later, however, to avoid the running of California's one year statute for personal injuries, Cleary filed this action against Wasserwald on November 21, 1990. (Append. p.50). The case was specially assigned to a judge who recused himself because he knew Wasserwald's wife, Hon. Florence Picard, Superior Court of California. The case was then transferred to another judge, who, after Wasserwald's default had been taken (set aside upon stipulation when the judge said he would set

aside if there was no stipulation), entertained two demurrers and motions to strike, after which the complaint was dismissed with prejudice.

The Court of Appeal affirmed in an opinion where it noted that Cleary acquiesced in his independent contractor status, barring his claim for indemnity for federal taxes. It then held, however, that the claim for personal injury was barred by the exclusive remedy provisions of the worker's compensation law, coverage afforded only employees under the statute.

The court held that Cleary was paid what he was worth, that values are set by the marketplace, that Cleary should have quit, and that Wasserwald had no obligation to make Cleary "feel good" by paying any particular salary - "as a matter of law." Finally, the court held that the tort remedies for breach of the covenant of good faith and fair dealing were no longer

available, only contractual remedies where the complaint "rises to the level of a violation of public policy," which allegations about rate and manner of pay, insurance coverage and discharge do not raise. The court opined that it cannot interject itself into the employment relation. The court held that as there was no theory for breach of contract (there was), plaintiff had failed to state a cause of action and the complaint was properly dismissed, leaving petitioner without remedy. (Append. p.18.)

As noted above, the California Supreme Court denied the petition for review of the Court of Appeal's decision on April 14, 1993. (Append. p.20.)

Reasons To Grant The Writ

I.

Misclassification Of Employees As Independent Contractors Costs The Federal Government $20 Billion A Year

The sum here is small, but the proportions of the problem are immense.

> In an era of large federal budget deficits, the Internal Revenue Service (IRS) has increased its efforts to plug leaks in the tax system. One of the largest perceived leaks is the misclassification of workers as independent contractors. The revenue loss to the federal government has been projected to be as high as $20 billion per year.

On July 22, 1992, the Joint Committee of Taxation issued

a report[1] on misclassification of independent contractors. That report cited to an IRS survey of employment tax returns which found that 15 percent of employers misclassified employees as independent contractors. The IRS survey also found that employees reported more than 99 percent of their wages when they were classified as employees, but reported only 77 percent of their wages when they were classified as independent contractors. The survey found that workers who were

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[1]Joint Committee on Taxation Staff Discussion (JCX-27-92) of Present Law and Issues Relating To Misclassification of Employees and Independent Contractors, House Ways and Means Subcommittee on Select Revenue Measures Hearing, reprinted in Daily Tax Report (BNA), No. 152, L-20, July 23, 1992

> classified as independent contractors and who did not receive a Form 1099 only 29 percent of their wages. (Emphasis supplied) Pace, "Employees or Independent Contractors-Tax Consequences of Misclassifying Workers As Independent Contractors," Los Angeles Lawyer, p.17, (May 1993).

The recent confirmation process for attorney general highlighted the problem and the seriousness with which it is regarded by the public. First Zoe Baird and then Judge Kimba Wood had to withdraw from the nomination process for attorney general when it was learned that they both employed illegal immigrants as domestics for which they only belatedly paid employer taxes, after first having classified the employees as independent contractors. Now Stephen

Breyer, putative nominee to fill Justice White's seat on this Court, was disqualified when it was learned that he had not paid social security taxes for his employee. Whether these belated payments were at the suit of employees or at the instance of the IRS did not appear. But, it seems clear, judging from the public outcry which forced Ms. Baird's withdrawal, that the public feels it is both a wrong and a widespread practice to misclassify employees as independent contractors, and their concern is amply documented by the study, supra. A clearer case of a substantial federal question, one for which special and important reasons exist to review the case, would be hard to imagine. (U.S. Supreme Court, Rule 10.1.)

To understand the public's concern it is only necessary to recall that Social Security retirement and disability payments (SSI) are pegged to the amounts paid into

each taxpayer's account. This amount determines the monthly benefit. Even where an employee misclassified as an independent contractor pays the employee share of taxes, the employee suffers nonetheless a proportionate diminution of his interest in the Social Security account by one-half, because the employer evades, successfully, the employer contribution equal to the amount paid by the employee (7.5% or slightly more) mandated by I.R.C. Section 3111(a), Old Age, Survivors and Disability Insurance. This is an excise tax, imposed as a cost of doing business, and it is particularly galling to have it shifted to the employee in the form of a self-employment tax.

The public outcry, then, can be seen for what it is: a protest at being cheated out of insurance for their most worrisome concerns, disability and retirement. The current estimate of $20 billion lost a year

attests to the pervasiveness of the practice. Yet the Court of Appeal has the temerity to say it is the public's loss due to its "acquiescence," misunderstanding the nature of the tax as a withholding tax rather than as an excise tax, not withheld, but paid directly by the employer from separate funds, as if to say the public is in pari delicto. The truth is, of course, that the public, this lawyer included, is ignorant of tax law, a recognized legal specialty, and it relies upon the employer's honesty to treat them fairly. The public outrage at the Zoe Baird hearing was due to their betrayal, the prevalent feeling being that no one can be trusted. This Court can restore a measure of that trust.

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II.

The Americans With Disabilities Act Applies To Cases Pending On Its Effective Date Where The Gist of the Action Alleges a Violation Of The Act

a.

The Act Preempts State Tort Law, Is Remedial, And Must Be Liberally Construed

From what has been said above, the Court can easily see that the case here involves a claim that a disabled person was exploited for seven years by his employer, a psychologist (as well as a lawyer). Disparity of pay, promotion, denial of raises, denial of statutory benefits (worker's compensation, state disability and unemployment insurance), improper working

conditions (making petitioner subject to disbarred attorneys) were all factors in what was termed below, "wrongful employment." This employment occurred in a larger context of unethical mismanagement for which respondent was suspended from the practice of law until he passes an ethics exam and completes courses in law practice management. The order of suspension reciting the details of some, but only some, of respondent's offensive behavior was made part of the record below and was before the Court of Appeal, which made no mention of it. To this date, the suspension has not yet been lifted. (Respondent has taken but failed the ethics exam.) And additional charges are pending before the State Bar. (None by petitioner.) This information was submitted under a state law requirement that proof that the claim for emotional distress, which has no elements, is "genuine."

i.

The ADA's Preemption

42 U.S.C 12101, et seq.

Needless to say, there are no reported cases discussing the Americans With Disabilities Act, at least at this writing, as it took effect on July 26, 1992, 24 months after its enactment. Pub. L.101-336, Title I, Section 108, 104 Stat. 337, set out as a Statutory Note to 42 U.S.C. Section 12112. (This raises a separate problem, treated below.) That is, the Act was effective when the Court of Appeal rendered its decision here on January 29, 1993.

The Equal Opportunity Commission (EEOC) is responsible for the enforcement of the ADA. 42 U.S.C. Section 12116. Pursuant to Section 12116, the EEOC was directed to issue regulations implementing the Act no

later than July 26, 1991, or 1 year before the Act's "effective" sate, i.e., parts of the Act were effective upon enactment despite the Act's statement that it takes effect on July 26, 1992. (See also, Section 12117 which directs that coordinating regulations implementing the Act be issued jointly by the agencies specified "not later than 18 months after July 26, 1990." Clearly, the Act had a present effect when enacted.)

In conformity with Section 12116, the EEOC issued its regulations on July 26, 1991, effective July 26, 1992. 29 C.F.R., Ch. XIV, Section 1630, p. 395. Appended to the regulations was Interpretive Guidance issued by the EEOC. Id., at p. 404. This guidance states the ADA is a federal anti-discrimination law designed to remove barriers against disabled persons so that they enjoy the same employment opportunities as the non-disabled. "Like the Civil Rights

Act of 1964...the ADA seeks to ensure access to equal employment opportunities based on merit." Ibid.

The general rule is set forth by statute: "No covered entity [an employer of 25 or more employees] shall discriminate against a qualified individual with a disability because of the disability...in regard to the hiring, advancement or discharge of employees, employee compensation...and other terms, conditions, and privileges of employment." 42 U.S.C Section 12112(a); Section 12111(2),(5)(A). Disability means a person with a history of physical or mental impairment, which includes any mental or psychological disorder such as emotional or mental illness. 29 C.F.R. 1603.2(g)(2),(h)(2). The discrimination prohibited includes: hiring, upgrading, promotion, tenure, demotion, transfer, layoff, termination; rates of pay and change in compensation; organizational

structure and lines of progression; fringe benefits available by virtue of employment; and any other "term, condition or privilege of employment." 29 C.F.R. Section 1630.4(b),(c),(d),(f),(i). One of the main intents of the law is to ensure that people with a history of disability are not discriminated against, especially intending that employees with disabilities be accorded equal access to whatever health insurance coverage the employer provides to other employees. Interpretive Guidance, Appendix, 29 C.F.R. Section 1630.2 (K), p.409, and Section 1630.5, p. 416. The Act provides that it may be enforced by the person affected in a private action, in like fashion with the Civil Rights Act of 1964. 42 U.S.C. Section 12117(a); 42 U.S.C. Section 2000e-5(f)(1). This means that in a private action the disabled person may recover damages for lost wages, health care expenses, pain and suffering, and, in

extreme cases, a special sum of money to punish the employer. Mental Health Consumers in the Workplace, An ADA Handbook, pp.30-31 (Mental Health Law Project, 1101-15th St., N.W., Suite 1212, Washington, D.C. 20005, 202-467-5730, 1992 - an excellent topical summary of the law.)

It must be readily apparent that, at least facially, the Act applies to this case. But if that is so, then the Act pre-empts state law and it should have been applied sua sponte by the Court of Appeal.

The EEOC in its regulations states:

> ...(2) Relationship To Other Laws. This part does not invalidate or limit the remedies, rights and procedures of any federal law or law of any state...or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this part.

(Emphasis supplied.) 29 C.F.R. 1630.1(c)(2).

The clear, albeit negative, implication is that where, as here, the state law, tort included, provides less protection than the Act, state law is pre-empted and the Act applies to the exclusion of state law. Here, of course, the Court of Appeal holds that the very acts covered by the Act do not constitute a cause of action under state tort law. Hence, state law was pre-empted and the Act should have been applied, again sua sponte, as the law applying at the time of decision. Fisher v. City of Berkeley, 37 Cal.3d 644, 654, n.3 (1984), aff'd. 475 U.S. 260 (1986).

All doubt about a pre-emption is laid to rest by the EEOC's Interpretive Guidance.

The ADA does not pre-empt any

> federal law, or any state law, that grants individuals with disabilities protection greater than or equivalent to that provided by the ADA... [Para.] This...means that an individual with a disability could choose to pursue claims under...tort law...if the potential available remedies would be greater than those under the ADA and this part. 29 C.F.R. Section 1630, Appendix, p.406.

The very clear implication is that state tort law is pre-empted if it provides less protection, or, as here, none to a disabled person. The Act sets a minimum standard of protection below which the states may not fall.

Hence, it follows that this Act should have been applied, sua sponte, before

the dismissal was affirmed. This is an important question which must be settled by this Court. After all, the standard in reviewing demurrers, even under state law, is that all the material allegations of the complaint are deemed true without regard to plaintiff's ability to prove them at trial. A demurrer cannot be used to screen a claim for emotional distress. The legal theory pled is not itself determinative so long as facts are pleaded showing that plaintiff may be entitled to some relief. Molien v. Kaiser Foundation Hospitals, 27 Cal.3d 916 (1980), at 919, 930. Thus the failure to label the action should not defeat it if the facts alleged show the right to some relief.

The argument here is independent of the argument which follows, about the Act's retroactive effect. To our knowledge this Court has not considered the question of retroactivity where the law in question pre-empts state law. We argue the pre-emption

in itself, effective on July 26, 1992, required the state court to apply federal law at the time it decided this case in January 1993, as that was Congress' clear intent. Thus, formally considered, there was no applicable state law in effect when the case was decided. Pre-emption is conceptually apart from the issue of retroactivity, discussed infra.

ii.

The ADA Is

Retroactive

The Court is asked here to revisit and decide when an act of Congress is prospective or retroactive. This Court noted in Kaiser Aluminum & Chemical Co. v. Bonjorno, 494 U.S. 827 (1990) that its own views of the applicability of enactments are in "apparent tension." Id., at 837. In

Bradley v. Richmond School Board, 416 U.S. 696 (1974), this Court held:

> [A] court is to apply the law in effect at the time it renders its decision...[E]ven where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect... [W]e must reject the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature. Id., at 711, 715.

But in a later case this Court held, without citing Bradley, supra, that "retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed

to have a retroactive effect unless their language requires this result." Brown v. Georgetown University Hospital 488 U.S. 204, 208 (1988).

It has already been pointed out above that parts of the ADA were effective upon enactment as they called for regulations to be issued within 12 and 18 months of passage, respectively. 42 U.S.C. Section 12116, 12117(b). Hence the note that the Act is effective two years after enactment (July 26, 1992) is not entirely so.

The picture becomes complex with the passage of the Civil Rights Act of 1991 which purported to amend the ADA at 42 U.S.C. Section 12111, and Section 12112. The civil rights amendments, however, explicitly provided, in two separate sections, that the amendments were not to be construed to have retroactive effect: in the case of Section 109(c), not before the date

of enactment (1991); and, in the case of Section 402(b)(the Ward's Cove Amendment) not to any disparate impact case filed before March 1, 1975 and for which an initial decision was rendered after October 1, 1983. (Based upon these sections the 9th Circuit has held that the 1991 amendments show that the other provisions of the Civil Rights Act applies to pending cases. But the 5,7, and 8 circuits took the opposite view. Davis v. San Francisco, 976 F.2d 1536 (9 Cir. 1992), at pp. 1551, 1552, 1553.)

The argument is, succinctly, that as the Civil Rights Amendments (effective upon passage in 1991) amended the ADA, (otherwise not to take effect until July 26, 1992) but specifically stated that they were not to be applied retroactively in two enumerated instances, the remainder of the ADA was intended to apply to pending cases, and, possibly, to prior conduct as well. What remains prospective upon the effective date

in 1992 was only the EEOC's administrative regulations and their enforcement. The private cause of action to enforce the ADA created by Section 12117, as it incorporates the procedure of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f)(1), clearly shows Congress's intent that the ADA apply to pending cases on its effective date. To hold otherwise would render the 1991 amendments surplusage, as they would merely restate, as if for emphasis, that the Act, otherwise not retroactive, was definitely not retroactive in the instances cited. But as the 9th Circuit pointed out, this would run afoul of what this Court has repeatedly stated to be the "'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." (Cits. omitted.) Davis, supra, 976 F.2d, at 1551. But holding that the 1991 amendments merely confirmed the already prospective nature of the ADA would

do just that. Hence, we must assume, as Congress held its 1991 amendments to the 1990 ADA non-retroactive in only two specific instances, that the remainder of the unamended ADA was to have retroactive effect upon its effective date, one year later.

This raises an important question which this Court can alone resolve, as the circuits are divided. But if the ADA applies on its effective date to pending cases the gist of which allege a statutory violation, then clearly, here, the dismissal, and the reasoning in support of it, were erroneous. We add that the argument above about pre-emption is a strong reason, additionally, to believe that Congress intended the ADA to have a retroactive effect.

As the Davis court concluded:

> We would rob sections 109(c) and 402(b) of all purpose were we to

hold that the rest of the Act does not apply to pre-Act conduct. There would have been no need for Congress to provide that the Act does not pertain to the pre-passage activities of the Ward's Cove Company, see Section 402(b), or of American Businesses Operating Overseas, see Section 109(c), if it had not viewed the Act as otherwise applying to such conduct. Congress's express declaration that the Act is to operate only with prospective force in two instances thus provides a clear indication of its intent that the rest of the Act... apply to cases pending at the time of enactment and to prior conduct not barred by the applicable statutes of limitations. Davis, supra 976 F.2d, at 1551.

III.

The ADA Sets A Public Policy Which State Courts Must Recognize In Ruling On State Causes Of Action

a.

Federal Law Sets Public Policy For The States

It has already been pointed out above that the clear intent of the ADA was to pre-empt state law where that law provides remedies unequal to or less than those contemplated in the Act. Again, the Act was enacted on July 26, 1990, effective July 26, 1992. It, therefore, clearly applies to an appellate decision rendered in January 1993 as even under state law the court must apply the law in effect at the time of its decision whether or not raised by the parties. Fisher v. City of Berkeley, 37 Cal.3d 644, 654, n.3 (1984), aff'd. 475

U.S. 260 (1986). Of course, this court is not bound by state law in deciding whether intervening federal law must be applied by the states, clearly a federal question. See II, supra, where this issue is more fully discussed. That state law here does not meet ADA standards is clear as the plaintiff has been denied all remedies.

i.

Wrongful Termination

Under California law, there are three ways to plead a cause of action for wrongful termination, one in tort and two in contract. The tort cause of action arises, ex delicto, from the contract but is based on public policy, usually, though not necessarily, found in a statute. The second cause of action is based on an implied-in-

fact contract whereby by the language, course of dealings, and conduct of the parties an employment at will is transformed into a contract for an indefinite term. The third cause of action is based upon the breach of the implied covenant of good faith and fair dealing which circumscribes the employer's right to discharge an employee. Originally sounding in tort, for which appropriate damages were awarded, this third cause of action has since been limited to contractual remedies, absent contrary legislative direction. Foley v. Interactive Data Corp., 47 Cal.3d 654, 696, relied upon by the Court below. Appendix, p.17. ("...[A]ppellant's discharge... [and] respondent's allegedly tortious violation of their promises... [about] rate and manner of pay, insurance coverage and discharge...do not rise to the level of violation of public policy... Thus, appellant cannot maintain his claim of a tortious breach of the

implied covenant of good faith and fair dealing." Ibid.)

The issue presented, then, is whether petitioner was denied Due Process of law and its Equal Protection when the state court failed or refused to consider the ADA and the policy qua policy it embodies as a basis for stating a cause of action under state law.

There is, in the first instance, every reason to believe that even under state law the Court of Appeal erred as the California Supreme Court in Foley states, "The employee may sue in tort for discharges based on breaches of public policy." Id., 47 Cal.3d, at 693, n. 30. In deciding what the policy is, Foley clearly has Congress in mind. "The large body of law restricting an employer's right to discharge based on discriminatory reasons...indicates that the legislature and Congress have recognized the importance of the employment relationship

and the necessity for vindication of certain legislatively and constitutionally established public policies in the employment context. The Tameny cause of action [tortious discharge in violation of public policy] likewise is responsive to similar public concerns." Id., 47 Cal.3d, at 693-694. So, it is plain that California intends that federal law be consulted in deciding whether there has been a tortious discharge in violation of public policy.

The question here is whether California must consider law, as it did not, despite its profession to the contrary. The focus here is slightly different from Point II, where it was argued that the ADA was retroactive so as to state a statutory cause of action. Here the question is whether the public policy embodied in the ADA applies to the States so that it must be considered by the States in deciding whether a state cause of action premised upon a breach of public

policy has been stated. In this context, the argument is that the ADA as policy is effective upon enactment, July 26, 1990, and though the discharge here occurred in 1989, the policy would clearly apply to cases filed after its enactment, here November 21, 1990, regardless of the Act's effective date (July 26, 1992) as statute. This is not unfair as statutes are passed as a consequence of public policy which to some extent must exist sometime prior to the passage of the law. The law then may be said to articulate the pre-existing policy. Yet, we know of no case so holding.

We ask here only that the case be remanded for the state court to consider whether the policy of the ADA should change the result under state law.

ii.

The State Court Denied Plaintiff Equal Protection And Due Process Under State Law

The court below tried to salve its conscience at dismissing plaintiff's complaint by saying that plaintiff has a remedy under the Worker's Compensation law. (This law too would be pre-empted by the ADA. Indeed the EEOC has held that no state has remedies equal to or greater than the ADA. N.69, p.36, ADA Handbook, supra.) But this is incorrect for several reasons. In the first place, the cause of action for mental distress inflicted upon an employee by an employer has been held to create an entire class of civil wrongs outside the worker's compensation system. Hentzel v. Singer Co., 133 Cal.App. 790 (1982), a case cited to the court but ignored in its opinion. Secondly, the complaint recited that plaintiff had sought state disability

and unemployment insurance, but was told he was ineligible because the employer did not pay into the state fund as he was carried as an independent contractor. As an independent contractor, there would, of course, be no worker's compensation insurance for petitioner. Third, of course, by the time the court decided the case the statute of limitations had run against a worker's compensation claim. The court effectively skirts this point. Fourth, the defendant effectively asserted, in a bold face contradiction, that plaintiff was an independent contractor for tax purposes but an employee for personal injury purposes, and, therefore, barred by the exclusive remedy provisions of the worker's compensation law. The Court of Appeal accepted this position; this is the very essence of bad faith and unfair dealing.

But, finally, California law provides an action at law for an employee

whose employer fails to "secure" payment of worker's compensation insurance, as respondent did here. Labor Code Section 3706. In such an action, as this was, "it is presumed that the injury to the employee was a direct result and grew out of the negligence of the employer, and the burden of proof is upon the employer, to rebut the presumption of negligence. It is not a defense to the employer that the employee was guilty of contributory negligence, or assumed the risk of the hazard complained of..." Labor Code Section 3708.

What the Court of Appeal did, however, despite respondent's burden of proof (respondent filed no brief on appeal), is that it found no negligence as a matter of law, holding that "[i]mposition of liability is inconceivable in this case." (Append.p. 15.) The court held that whether "'the tort of negligent infliction of mental distress... [exists] depends...upon a

weighing of policy considerations for and against imposition of liability.'" (Cites omitted.) Opinion, 10. But, again, the court did not weigh the policy of the ADA. In fact the court took the position directly contrary to the policy of the ADA holding, "[W]e conclude that respondents owed no duty to make appellant feel good by paying him as much as other employees at the law firm, or any particular salary at all, as a matter of law." (Append.p.16.) This is reminiscent of state court opinions prior to the passage of the Civil Rights Act of 1964. In fact, we already have seen that a primary concern of the ADA is discriminatory pay and where proved it constitutes a violation of public policy. "No covered entity shall discriminate against a qualified individual with a disability...in regard to...employee compensation..." 42 U.S.C. Section 12112(a), General Rule. So, again, at the very least, the state court should have considered the

policy embodied in the ADA in "a weighing of policy considerations for and against imposition of liability" under state law. (Append.p.15.)

In abolishing this Court's direct appeal jurisdiction and converting it to discretion alone, Congress assumed that the basis for a jurisdiction by appeal reflected an unjustifiable suspicion of state court action involving a federal question. But it was assumed in abolishing direct appeal from state courts that this Court would grant certiorari to review state court action which is suspect and which presents a public issue worthy of the Court's time. 28 U.S.C. Section 1257, Commentary to 1988 Revision by David D. Siegel.

This is such a case. In attitude, approach and tone the Court of Appeal has exhibited an indifference to the welfare of the persons embraced by the ADA. "The judicial system cannot interject itself

[into the employment situation]. The reasonableness of the salaries offered by employers is determined by the marketplace, not in the courtroom." (Append. p.16.) But interjecting the courts into the marketplace is exactly what the ADA is about, especially as to "terms, conditions and privilege of employment." 42 U.S.C. Section 12112, General Rule. It is precisely the ruthless efficiency of the marketplace that the ADA was intended to ameliorate. At the very least, California must consider this policy before it denies all relief.

Conclusion

Important reasons exist to grant this petition. The misclassification of employees as independent contractors deprives the government of $20 billion

annually, and deprives the employees of an equal amount of protection in employer excise tax contributions to social security. The recent public outcry about the employer's evasion of its responsibility shows the depth of the public's concern and the pervasiveness of the practice.

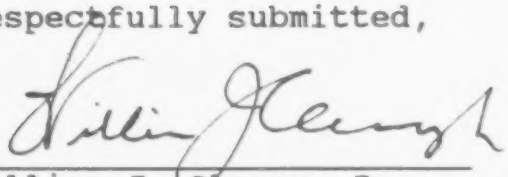
The Circuits are divided about when and whether the 1991 Civil Rights Act is retroactive, and, as the same act impacts the ADA by amendment, the division of opinion can be expected to implicate the ADA and to simply compound itself. This Court itself has recognized an apparent tension in its opinions about when an act of Congress is prospective or retroactive. This Court alone can resolve this tension.

The ADA has not yet been approached by this Court. It is landmark legislation equated with the Civil Rights Act of 1964 and meant to be remedial. The state courts are ignoring the Act in setting their

policies, and defeating the very people the ADA was meant to vindicate.

Date: June 16, 1993

Respectfully submitted,



William J. Cleary, Jr.

92-2017

Supreme Court, U.S.
FILED
JUN 21 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

October Term 1992

No.

WILLIAM J. CLEARY, JR.,

Petitioner,

v.

ROBERT WASSERWALD, INC.,
ROBERT WASSERWALD,
Individually,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

William J. Cleary, Jr.
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Los Angeles, CA. 90028
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Pro Se

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Opinion of Court of Appeal

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF

THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

WILLIAM J. CLEARY, JR., Plaintiff and Appellant,	)	B062478
	)	(Super.Ct.
v.	)	BC015585)
	)	
	)	[Court of
ROBERT WASSERWALD et al.,	)	Appeal
Defendant and Respondents	)	"FILED
	)	JAN. 29,
	)	1993"]

APPEAL from the judgment of the Superior Court of Los Angeles County. William E. Burby, Judge. Affirmed.

William J. Cleary, Jr., in pro.per., for Plaintiff and Appellant.

No appearance for Defendants and Respondents.

The trial court sustained respondents' demurrers to appellant's second amended complaint without leave to amend. Respondents then obtained from the court clerk a dismissal of the case with prejudice. We affirm.

PROCEDURAL HISTORY

Appellant William J. Cleary, Jr., filed suit against respondents Robert Wasserwald and Robert Wasserwald, Inc. on November 21, 1990.[1] Default was entered against respondents on February 14, 1991. Appellant asserts that respondents' only response to the default was to file a notice of demurrer to the complaint and a motion to strike. On March 7, 1991, the trial court issued an order to show cause why sanctions should not be imposed in appellant for his

[1]Respondents have failed to file briefs in this court. Rule 17(b) of the California Rules of Court provides that if no respondents brief is filed, "the court may accept as true the statement of facts in the appellant's opening brief...."

failure to obtain a default judgment.

A hearing was held on April 11, 1991 at which time the court considered both the order to show cause and the demurrers. Appellant stipulated to have the defaults set aside after the trial court indicated that it would certainly vacate the defaults if a motion were made. The court then ordered that the defaults be set aside pursuant to the stipulation, and sustained respondents' demurrers with leave to amend.

On May 2, 1991, appellant filed a first amended complaint. Respondents again demurred and moved to strike appellant's punitive damage allegations. Their demurrers were sustained with leave to amend, and their motion to strike was granted.

Appellant filed a second amended complaint on July 19, 1991. Respondents demurred and moved to strike. On October 1, 1991, the trial court "granted" (i.e.,

sustained) the demurrers without leave to amend and took the motion to strike off calendar as being moot. The court also directed that respondents prepare an order for the court's signature and approval. Instead, respondents filed a "Request for Dismissal" with the court clerk on October 7, 1991. The dismissal, with prejudice, was entered by the clerk on October 8, 1991. Appellant filed a notice of appeal from the October 1, 1991, order on October 22, 1991.

ALLEGATIONS

Appellant argues that he is a lawyer who was hired to work as an associate in Robert Wasserwald's eponymous law firm. Respondents agreed to pay appellant an annual salary of only $18,000, despite appellant's ten years of legal experience in the state of New Jersey. Respondents knew appellant had been hospitalized for mental and emotional problems. Nevertheless,

respondents deliberately inflicted emotional pain, humiliation and distress on appellant by hiring less experienced lawyers (and even two disbarred lawyers and some nonlawyers) at higher salaries, and by reneging on promises to raise appellant's salary to certain levels. Appellant alleges that he felt exploited and oppressed by respondents' conduct, especially because respondents knew it would be difficult if not impossible for appellant to find other professional employment.

In addition to oppressing appellant, respondents allegedly treated appellant as an employee but paid him as an independent contractor. As a result, the Internal Revenue Service assessed unpaid taxes of $6,000 against appellant, retroactive to 1986. These taxes would not have been incurred, appellant alleges, had respondents properly withheld taxes from his compensation. Moreover, the IRS recorded a

lien for $4,966 against appellant to recover the unpaid taxes. Because respondents carried appellant as an independent contractor instead of an employee, appellant was deprived of unemployment and disability insurance coverage.

In his original complaint, appellant pleaded claims of negligent infliction of emotional distress and "breach of covenant," and requested punitive damages. In subsequent versions of his complaint, appellant sought indemnity against respondents for the unpaid taxes. In addition, he seeks damages because the IRS lien has impaired his credit rating.

DISCUSSION

1. Appealability

An order sustaining demurrers without leave to amend is not a final judgment and is generally not appealable. (Darr v. Yellow Cab Co. (1967) 67 Cal.2d 695, 699.) A judgment of dismissal

following such an order is appealable. (E.L. White, Inc. v. City of Huntington Beach (1978) 21 Cal.3d 497, 504.)

In this case, respondents failed to obtain a judgment or order of dismissal from the trial judge; however, a dismissal with prejudice was obtained from the clerk. Despite respondents' novel approach to having a dismissal entered, we conclude that this alone does not preclude appellant's appeal. Courts have in some instances entertained appeals following the sustaining of demurrers without leave to amend where the plaintiff himself dismisses his own action with prejudice merely to expedite an appeal. (Ashland Chemical Co. v. Provence (1982) Cal.App.3d 790, 792.) No matter how it was obtained, a dismissal was entered here which operated to terminate appellant's suit.

In any event, we would elect to deem the order sustaining the demurrer without

leave to amend as incorporating a judgment of dismissal, had no dismissal been entered at all. (Molien v. Kaiser Foundations Hospitals (1980) 27 Cal.3d 916, 920-921.)

2. Indemnity and Impairment of Credit

"Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person." (Civ. Code, Section 2772.) The obligation of indemnity "may arise by virtue of express contractual language establishing a duty in one party to save another harmless upon the occurrence of specified circumstances. Second, it may find its source in equitable considerations brought into play either by contractual language not specifically dealing with indemnification or by the equities of the particular case." (E.L. White, Inc. v. City of Huntington Beach, supra, 21 Cal.3d at pp. 506-507.)

Appellant's second amended complaint

does not point to any express contractual language establishing a duty to indemnify. Nor does he allege the existence of an implied agreement to pay appellant's tax obligations to the IRS: he alleges only, in his exemplary damages attachment, that respondents "failed and neglected to carry plaintiff on his payroll as an employee, paying him instead as an independent contractor." There is no mention of any promise to pay appellant as an employee and withhold taxes. On the contrary, the allegations that respondents paid appellant for years as an independent contractor belie any indication of an implied promise to withhold taxes.

Absent any allegation of an express or implied contractual agreement to indemnify appellant for his unpaid income taxes, the sole remaining grounds for allowing this cause of action would be "the equities of [this] particular case." (E.L.

White, Inc. v. City of Huntington Beach, supra, 21 Cal.3d at p. 507.) It is clear from an examination of the face of the second amended complaint that the equities in this case do not favor appellant. Appellant knowingly accepted payment on an independent contractor basis for seven years. He does not allege that he challenged this practice by notifying respondents or the IRS of any seeming impropriety. He does not allege that he took any measures to safeguard his income tax status with the IRS during all of those years, though he unquestionably knew no taxes were being withheld from his income. It can only be concluded that appellant acquiesced in respondents' decision to pay him on an independent contractor basis.

The statute relied upon by appellant, Labor Code section 2802, is inapposite here. That statute provides for employer indemnification for losses the

employee incurs in the discharge of his duties or by his obedience to the directions of his employer, unless the employee knew the directions were unlawful. The statute is plainly directed at injuries arising from the employee's performance of his duties. Here, the issue was not appellant's performance of his duties or his need to "obey" his employer; rather, it was appellant's acquiescence for seven years in his status as an independent contractor. This case concerns an essential aspect of appellant's employment --independent contractor versus employee-- not an employer directive to perform a certain job in a certain manner.

Appellant asks this court to consider additional evidence that came to light in mid-1992. Respondents have failed to interpose any objection to the proffered evidence. The evidence appellant has submitted consists of a letter addressed to

him from the IRS which indicates that appellant acted as an employee rather than as an independent contractor during his tenure at respondents' law firm. The letter concludes that respondents must issue appellant a Form W-2 on an annual basis.

Even if we consider appellant's additional evidence, it still did not relieve appellant of his duty either to pay income taxes as a self-employed individual or insist on being paid as an employee with proper withholding during the period he was employed by respondents. Appellant was responsible for the deficiency assessment and lien which resulted from his failure to ensure the sufficiency of his tax payments. The impairments of appellant's credit caused by the IRS lien may be similarly attributed to appellant's acquiescence in his payment arrangement and his failure to notify the IRS of his employment situation.

Finally, appellant relies upon Bloom

v. United States (9th Cir. 1959) 272 F.2d 215, for the proposition that respondents are liable for 100 percent of his tax liability. The Bloom case is distinguishable. There, the employer deducted income taxes from his employees' wages, "but none of the withheld taxes...were ever paid to the United States." (Id. at p. 218.) The court concluded that the employees had to be credited with amounts deducted from their wages, and that the employer could be penalized for failing to pay over the withholdings to the government. (Id. at p. 220.) In the instant case, by contrast, appellant does not allege that he should receive credit for monies respondents withheld from his paycheck.

3. Negligent Infliction of Emotional Distress

Appellant alleged, in his original complaint, that respondents' conduct in

hiring less experienced attorneys at higher salaries, and their refusal to raise his salary to certain levels caused him to suffer emotional distress. As appellant puts it in his brief, "the whole employment situation here was an insult."

If we accept appellant's premise that he was at all times an employee of respondents' law firm, then we must conclude that his emotional distress claims are barred by the exclusionary provisions of the Workers' Compensation Act. Appellant's sole remedy is worker's compensation.

Alternatively, even if we were to conclude that appellant is not limited to his workers' compensation remedy, his claim must still fail. "The tort of negligent infliction of emotional distress is a variation of the tort of negligence. The traditional elements of duty, breach of duty, causation, and damages apply. [Para.] Whether a defendant owes a duty of care is a

question of law. Its existence depends upon the foreseeability of the risk and upon a weighing of policy considerations for and against imposition of liability." (Slaughter v. Legal Process & Courier Service (1984) 162 Cal.App.3d 1236, 1249.)

Imposition of liability is inconceivable in this case. Appellant accepted a job with respondents at a low salary. He alleges that his salary increased somewhat over the years, though obviously not as much as appellant hoped or expected. The judicial system cannot interject itself into the process of determining the value of appellant's services. Respondents paid appellant what they thought he was worth. Appellant was not an indentured servant: if he thought he was being underpaid, he should have left respondents' employ. Instead, he remained at respondents' firm for over seven years, discontent, but apparently not discontent

enough to leave. This court cannot impose upon employers the pay scale that their employees believe ought to be paid. The reasonableness of the salaries offered by employers is determined by the marketplace, not in the courtroom. For this reason, we conclude that respondents owed no duty to make appellant feel good by paying his as much as other employees at the law firm, or any particular salary at all, as a matter of law.

4. Breach of Covenant

In his brief on appeal, appellant clarifies that his "breach of covenant" cause of action refers to the covenant of good faith and fair dealing. He alleges that this covenant was tortiously breached when respondents systematically exploited him, failed to provide unemployment and disability insurance, paid him an inadequate salary, and terminated his employment.

Assuming that the tort appellant

alleges is not encompassed by workers' compensation, his claim is still unavailing, In Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654, 696, the Supreme Court wrote, "the employment relationship is fundamentally contractual, and several factors combine to persuade us that in the absence of legislative direction to the contrary contractual remedies should remain the sole available relief for breaches of the implied covenant of good faith and fair dealing in the employment context." (Emphasis added.) The broad language used by the court encompasses not only appellant's discharge from respondents' law firm, but respondents' allegedly tortious violation of their promises to him as well. Appellant's complaints about his treatment at respondents' hands are fundamentally contractual in nature: rate and manner of pay, insurance coverage, and discharge. They do not rise to the level of a violation

of public policy. (Id. at pp. 665-671, citing Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167.) Thus, appellant cannot maintain his claim of a tortious breach of the implied covenant of good faith and faith [sic] dealing.[2]

5. Punitive Damages

In the preceding sections, we have concluded that appellant has not stated any cause of action --either in tort or in equity-- against respondents, despite having had three opportunities to do so. Because of his inability to state a claim, his request for punitive damages was properly stricken.

---

[2] We note that appellant has not attempted to recover on a breach of contract theory. He has not alleged the existence of an oral or written employment contract. Indeed, it appears that the only agreement between the parties was an agreement to carry appellant as an independent contractor.

DISPOSITION

The judgment (dismissal with prejudice) is affirmed.

NOT TO BE PUBLISHED.

BOREN, P.J.

We concur:

FUKUTO, J.

NOTT J.

Order of California Supreme Court
Denying Petition

[Stamped:
FILED
April 14, 1993
Robert Wandruff
Clerk
Deputy]

Second Appellate District, Division Two,
Nol B062478
S031403

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

WILLIAM J. CLEARY, JR., Appellant

v.

ROBERT WASSERWALD Et al., Respondents

Appellant's petition for review DENIED.

LUCAS
Chief Justice

IRS Letters

Internal Revenue Service
District Director

Department of the Treasury

Person to Contact:
Lynda A. Angulo

Address: P.O. Box 231, Rm. 4012
Los Angeles, CA. 90053
Telephone: (213) 894-2299

Refer Reply to: SP:1503:LA 2049

Date: July 23, 1992

William J. Cleary, Jr.
1853 1/2 N. Canyon Drive
Los Angeles, CA. 90028

Dear Taxpayer:

This is to reply to your request for a determination as to your Federal employment tax status with respect to the services you performed for ROBERT WASSERWALD, INC.

As authorized by Section 5.04 of Rev. Proc. 92-1, I.R. B 6, we have enclosed a copy of the determination letter to the above firm concerning your status.

Sincerely,

Lynda A. Angulo
Employment Tax Specialist

Enclosure: Determination Letter

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Internal Revenue Service
District Director

Department of the Treasury

Person to Contact:
Lynda A. Angulo

Address: P.O. Box 231, Rm. 4012
Los Angeles, CA. 90053
Telephone: (213) 894-2299

Refer Reply to: SP:1503:LA 2049

Date: July 23, 1992

KEY

WORKER: WILLIAM J. CLEARY, JR.

FIRM: ROBERT WASSERWALD, INC.

Dear Taxpayer:

This is a Federal Employment Tax Determination with respect to the working relationship between the Firm and the Worker who performed services as a(n) ATTORNEY.

The Worker would be considered an employee of the Firm based on the following pertinent facts submitted for consideration:

1. Worker was directed by the Firm and subject to its review.

A worker who is required to comply with other person's instructions about when, where, and how he is able to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. See Rev. Rul. 68-598, 1968-2 CB 464 and Rev. Rul. 66-381, 1966-2 CB 449.

2. The Worker's services were fully integrated into the Firm's business operations.

Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of

the business. See United States v. Silk, 331 US 704 (1947), 1947-2 CB 167.

3. The services had to be performed personally by the Worker.

If the service must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as the results. See Rev. Rul. 55-695, 1955-2 CB 410.

4. There was a continuing relationship between the Worker and the Firm for an approximate duration of four (4) years.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship may exist where work is performed at frequently recurring although irregular intervals. See United States v. Silk, 331 US 704 (1947),

1947-2 CB 167.

5. The Worker devoted his full-time to the business of the Firm.

If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such persons or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. See Rev. Rul. 56-694, 1956-2 CB 694.

6. Work was done on the Firm's premises.

If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. See Rev. Rul. 56-660, 1956-2 CB 693.

7. The Worker furnishes a time record to the

Firm.

A requirement that a worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. See Rev. Rul. 70-309, 1970-1 CB 199 and Rev. Rul. 68-248, 1968-1 CB 431.

8. The Worker was paid a salary.

Payments by the hour, week or month of regular amounts at stated intervals to a worker strongly indicate an employer-employee relationship. See Rev. Rul. 74-389, 1974-2 CB.

[no #9, sic] 10. The Firm reimbursed the Worker for mileage.

If the person or persons for whom the services are performed ordinarily pay the worker's business and/or travelling expenses, the worker is ordinarily an employee. An employer, to be able to

control expenses, generally retains the right to regulate and direct the worker's business activities. See Rev. Rul. 55-144, 1955-1 CB 483.

11. Necessary tools and materials were furnished by the Firm.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. In some occupational fields, e.g. skilled workers, workers customarily furnish their own tools. Such practice does not necessarily indicate a lack of control over the services of the worker. See Rev. Rul. 71-524, 1971-2 CB 346.

12. The Worker has no financial investment in the business related to the services performed.

A lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship. See Rev. Rul. 71-524, 1971-2 CB 346.

13. The Worker had no opportunity to realize a profit or suffer a loss as a result of the services performed for the Firm.

A worker who can realize a profit or suffer a loss as a result of the worker's services, in addition to the profit or loss ordinarily realized by employees, is generally an independent contractor, but the worker who cannot is an employee. "Profit or loss" implies the use of capital by the individual in an independent business of his own. Thus, opportunity for higher earnings, such as from pay on a piecemeal basis or the possibility of gain or loss from a

commission arrangement, is not considered profit or loss. See Rev. Rul. 70-309, 1970-1 CB 199.

14. The Worker does not represent himself to the general public as being in business to perform the same or similar services.

The fact that a worker makes his or services available to the general public on a regular and consistent basis indicates an independent contractor relationship. See Rev. Rul. 56-660, 1956-2 CB 693.

15. The Firm had the right to discharge the Worker at any time without incurring a liability.

The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which

causes the worker to obey the employer's instructions. See Rev. Rul. 75-41, 1975-1 CB 323.

16. The Worker had the right to terminate his services at any time without incurring a liability.

If a worker has the right to end his or her relationship at any time he wishes without incurring liability, that factor indicates an employer-employee relationship. See Rev. Rul. 70-309, 1970-1 CB 199.

Section 3121(d)(2) of the Internal Revenue Code defines "employee" as any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.

The question of whether an individual is an employee under the common law rules or an

independent contractor is one of fact to be determined upon consideration of the facts and the application of the law and regulations in a particular case. Guides for determining the existence of that status are found in three substantially similar section of the Employment Tax Regulations; namely sections 31.3121(d)-1(c),, 31.3306(i)-1, 31.3401(c)-1.

These sections provide that generally the relationship of employer and employee exists when the person or person for whom the services are performed have the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but as to how it shall be done. In

this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so.

It is our conclusion, based on all facts submitted for consideration, that the Firm either exercised or retained the right to exercise the direction and control over the services performed by the Worker. This control establishes an employer-employee relationship. Accordingly, the worker would be considered an employee of the Firm for purposes of the Federal Insurance Contribution Act, the Federal Unemployment Tax Act, and for the Collection of Income Tax at Source on Wages.

The Firm must, therefore, issue to the Worker a Form W-2, Wage and Tax Statement, on an annual basis.

On November 8, 1978, Section 530 of the Revenue Act of 1978, was signed into law. This Act places limitations upon the Internal Revenue Service with respect to any enforcement activities involving employment taxes. Briefly, the Internal Revenue Service may not compel an organization to treat an individual as an employee if the organization has a "reasonable basis" for treating the individual as self-employed.

This ruling is applicable to any other individuals engaged by the Firm under similar circumstances. This ruling is directed only to the taxpayer to whom it is addressed. Section 6110(j)(3) of the Internal Revenue Code provides that it may not be used or cited as a precedent.

Sincerely,

Archie Nakaoka

Employment Tax Group Manager

Federal Insurance Contributions Act

Section 3101. Rate of tax

(a) Old-age, survivors, and disability insurance. -In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of wages...

(b) Hospital insurance. -In addition to the tax imposed by the preceding subsection, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages...

Section 3102. Deductions from wages

(a) Requirement. -The tax imposed by section 3101 shall be collected by the

employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid.

Internal Revenue Code

Section 3111(a) and (b)

Rate of tax

(a) Old-age, survivors, and disability insurance.

In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages...

(b) Hospital insurance

In addition to the tax imposed by the preceding section, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages...

Internal Revenue Code

Section 6672

Failure to collect and pay over tax, or attempt to evade or defeat tax

(a) General rule. -Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid for and paid over.

Section 12112 Discrimination:

42 U.S.C. Section 12112(a)

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. Section 12116

Regulations

Not later that 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this title in accordance with subchapter II of chapter 5 of Title 5.

42 U.S.C. Section

12117(a) and (b)

Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C.A. Section 701 et seq.] shall develop procedures to ensure that

administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C.A. Section 701 et seq.] are dealt wit in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973 [29 U.S.C.A. Section 701 et seq.]. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed.Reg. 7435, January 23, 1981)) in regulations implementing this

subchapter and Rehabilitation Act of 1973 [29 U.S.C.A. Section 701 et seq.] not later than 18 months after July 26, 1990. (Publ.L. 101-336, Title I, Section 107, July 26, 1990, 104 Stat. 336.)

29 Code of Federal Regulations

Section 1630.1(c)(2)

(2) Relationship to other laws. This part does not invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this part.

29 Code of Federal Regulations

Section 1630.2(g) and (h)

(g) Disability means, with respect to an individual--

(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) A record of such impairment; or

(3) being regarded as having such an impairment.

(h) Physical or mental impairment means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive,

genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or physiological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

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29 Code of Federal Regulations

Section 1630.4 Discrimination Prohibited

It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual with a disability in regard to:

(a) Recruitment, advertising, and job application procedures;

(b) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(c) Rates of pay or any other form of compensation and changes in compensation;

(d) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(e) Leaves of absence, sick leave, or any other leave;

(f) Fringe benefits available by virtue of employment, whether or not

administered by the covered entity;

(g) Selection and financial support for training, including: apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;

(h) Activities sponsored by a covered entity including social and recreational programs; and

(i) Any other term, condition, or privilege of employment.

APPENDIX TO PART 1630

Interpretive Guidance On Title I Of The Americans With Disabilities Act

Background

The ADA is a federal antidiscrimination statute designed to remove barriers which prevent qualified

individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities.

Like the Civil Rights Act of 1964 that prohibits discrimination on the basis of race, color, religion, national origin, and sex, the ADA seeks to ensure access to equal employment opportunities based on merit.

Section 1630.1(b) and (c), Applicability and Construction

The ADA does not preempt any Federal law, or any state or local law, that grants to individuals with disabilities protection greater than or equivalent to that provided by the ADA. This means that the existence of a lesser standard of protection to individuals with disabilities under the ADA

will not provide a defense to failing to meet a higher standard under another law. Thus, for example, title I of the ADA would not be a defense to failing to collect information required to satisfy the affirmative action requirements of section 530 of the Rehabilitation Act. On the other hand, the existence of a lesser standard under another law will not provide a defense to failing to meet a higher standard under the ADA. See House Labor Report at 135; House Judiciary Report at 69-70.

This also means that an individual with a disability could choose to pursue claims under a state discrimination or tort law that does not confer greater substantive rights, or even confers fewer substantive rights, if the potential available remedies would be greater than those available under the ADA and this part. The ADA does not restrict an individual with a disability from pursuing such claims in addition to

charges brought under this part. House Judiciary at 60-79.

Labor Code Section 3706.

Failure to secure payment of compensation; Remedies of employee

If any employer fails to secure the payment of compensation, any injured employee or his dependents may bring an action at law against such employer for damages, as if this division did not apply.

Labor Code Section 3708.

Action for damages; Presumption of negligence; Burden of proof; Defenses abolished; Applicability with respect to certain domestic, personal, and casual employees

In such action it is presumed that

the injury to the employee was a direct result and grew out of negligence of the employer, and the burden of proof is upon the employer, to rebut the presumption of negligence. It is not a defense to the employer that the employee was guilty of contributory negligence, or assumed the risk of hazard complained of, or that the injury was caused by the negligence of an fellow servant.

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EXCERPTS FROM CLERK'S TRANSCRIPT

Complaint

William J. Cleary, Jr.
1853 1/2 N. Canyon Drive
Los Angeles, CA. 90028
(213) 465-3633
In Propria Persona

[FILED
Nov. 21, 1990
Frank S. Zolin,
County Clerk
by P. Offord, Deputy]

Superior Court of California
Central District - Los Angeles
111 N. Hill Street
Los Angeles, CA. 90012

Plaintiff: WILLIAM J. CLEARY, JR.

Defendant: ROBERT WASSERWALD, individually; and ROBERT WASSERWALD, INC.

Case Number BC 015585

FIRST CAUSE OF ACTION - NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Beginning in August 1983 and continuing to December, 1990 at Los Angeles, CA. 6922 Hollywood Boulevard, and, 315 West Ninth Street

Description of reason for liability:

Plaintiff is a lawyer and was admitted to practice law in all courts of California in 1982. In August 1983, defendant, a lawyer

and a psychologist (M.A. Psychology), hired plaintiff as an Associate in his law practice at an annual salary of $18,000.00, despite the fact that plaintiff had a prior year of experience in California Law, and ten years of prior experience in New Jersey. Defendant knew that plaintiff had been hospitalized for mental and emotional problems. Nonetheless, defendant engaged in a course of conduct which defendant knew, or should have known, would inflict great mental pain and distress on plaintiff. Such conduct included hiring no less than ten additional attorneys with less experience at salaries greatly in excess of plaintiff's, and by refusing to raise plaintiff's salary to the starting salary of first-year associates in Los Angeles. Defendant alternately promised raises to $30,000, $35,000, $40,000, and $45,000, only to rescind each and every raise at or before it was payable. These practices caused

plaintiff great humiliations, mental pain and suffering and caused him to continually seek medical treatment.

SECOND CAUSE OF ACTION - BREACH OF COVENANT

Plaintiff incorporates by reference all allegations of the First Cause of Action. Additionally, plaintiff alleges that after several other lawyers left the firm, plaintiff complained that the firm was revolving door. Defendant replied, "You can stay as long as you want." Thereafter, defendant raised plaintiff's salary to $25,000. But, knowing plaintiff's medical condition, defendant failed to renew the insurance coverage of plaintiff, and failed and neglected to carry plaintiff on his payroll as an employee, paying him instead as an independent contractor. Nonetheless, defendant exercised close personal and professional control over plaintiff, treating him in all respects as an employee.

This deprived plaintiff of unemployment and disability coverage he was otherwise entitled to under Unemployment Insurance Code Sections 976, 986, etc. During periods of illness, defendant would require plaintiff to appear at the office and work, paying him not at all in some cases, or by the piece in others, and in still others paying him out of funds otherwise due him, terming them advances or loans. Finally, without prior notice, defendant fired plaintiff, leaving him without recourse to other insurance. Numerous encounters with defendant culminated in his stating, "If you won't give, I will take." Defendant also placed above plaintiff two disbarred lawyers he hired as analysts. Defendant systematically exploited plaintiff, breaching his duty of good faith and fair dealing.

EXEMPLARY DAMAGES ATTACHMENT: Plaintiff incorporates by reference all allegations of causes First and Second. Defendant engaged in a systematic course of conduct to deprive plaintiff of his rights under the Unemployment Insurance Code, committed fraud by promising raises and continued employment which he did not intend to honor, and by oppressing plaintiff personally and professionally by actions which humiliated plaintiff knowing that it was difficult if not impossible for plaintiff to find other professional employment. Defendant paid plaintiff a salary lower than any other attorney, lower than two disbarred attorneys placed over plaintiff, and lower than other non-lawyer employees. In fact, defendant engaged in a course of conduct which resulted in "adjusters" - non-lawyers- receiving a greater salary than plaintiff. All these actions oppressed plaintiff and caused him great shame.

First Amended Complaint

William J. Cleary, Jr.
1853 1/2 N. Canyon Drive
Los Angeles, CA. 90028
(213) 465-3633
In Propria Persona

[FILED
May 2, 1991
James H. Dempsey,
County Clerk
by R. Burt, Deputy]

Superior Court of California
Central District - Los Angeles
111 N. Hill Street
Los Angeles, CA. 90012

Plaintiff: WILLIAM J. CLEARY, JR.

Defendant: ROBERT WASSERWALD, individually; and ROBERT WASSERWALD, INC.

Case Number BC 015585

FIRST AMENDED PURSUANT TO LEAVE OF COURT

FOURTH CAUSE OF ACTION - Common Law Indemnity

Plaintiff alleges that defendant Robert Wasserwald; Robert Wasserwald, Inc. was the legal (proximate) cause of damages to plaintiff. By the following acts or omissions to act, defendant negligently caused the damage to plaintiff.

on (date): Beginning in 1986 and for a period thereafter, plaintiff was employed by defendant as an associate attorney. He was in all respects treated as an employee, but classified as an independent contractor. Nonetheless, his returns for tax purposes were always in the form of a W-2, not a 1099. Sometime in 1990 the IRS made a deficiency assessment, retroactive to 1986, for unpaid self-employment taxes. These taxes should not have been incurred and had they been paid, as is customary, by withholding as employee compensation, no additional liability would have been incurred.

The amount now claimed against defendant is in excess of $6,000 and is now due and payable. Wherefore, plaintiff seeks indemnity for all such taxes, state or federal, now assessed, or later to be assessed.

FIFTH CAUSE OF ACTION - Impairment of Credit

As a result of the aforesaid tax assessments, as IRS has recorded a lien for $4,966.69 and it has been recorded as a document number 90-111275 by the County Recorder. This lien, even after it is satisfied, remains available to credit raters for seven years. As a direct and proximate result of said recordation, plaintiff has been greatly injured in reputation and it has foreclosed the possibility of credit advances for the period of its recordation.

Wherefore, plaintiff seeks damages in amount to be determined by trial.

SUPERIOR COURT OF CALIFORNIA

7/02/91

Hon. William E. Burby, Jr., Judge

Nature of Proceedings:

Demurrer of defendants Robert Wasserwald and Robert Wasserwald, Inc. to First Amended Complaint of William J. Cleary, Jr.;

Motion of above to strike punitive damages attachment from plaintiff's first amended complaint:

The demurrer is sustained in the grounds set forth in the Points and Authorities as to the fourth and fifth causes of action of the First Amended Complaint, pursuant to section 430.10, Code of Civil Procedure.

The motion to strike is granted pursuant to section 436, Code of Civil Procedure.

Twenty days leave to amend.

Notice by moving party.

Second Amended Complaint

William J. Cleary, Jr.
1853 1/2 N. Canyon Drive
Los Angeles, CA. 90028
(213) 465-3633
In Propria Persona

[FILED
July 19, 1991
James H. Dempsey,
County Clerk
by C.L. Colman, Deputy]

Superior Court of California
Central District - Los Angeles
111 N. Hill Street
Los Angeles, CA. 90012

Plaintiff: WILLIAM J. CLEARY, JR.

Defendant: ROBERT WASSERWALD, individually; and ROBERT WASSERWALD, INC.

Case Number BC 015585

SECOND AMENDED COMPLAINT PURSUANT TO LEAVE OF COURT

FIRST CAUSE OF ACTION - Common Law Indemnity

Plaintiff William J. Cleary, Jr. alleges that defendant Robert Wasserwald; Robert Wasserwald, Inc. was the legal (proximate) cause of damages to plaintiff. By the following acts or omissions to act, defendant negligently caused the damage to

plaintiff.

on (date): Beginning in 1986 and for a period thereafter, plaintiff was employed by defendant as an associate attorney. He was in all respects treated as an employee, but classified as an independent contractor. Nonetheless, his returns for income tax purposes were always in the form of a W-2, not a 1099. Sometime in 1990 the IRS made a deficiency assessment, retroactive to 1986, for unpaid self-employment taxes. These taxes should not have been incurred and had they been paid, as is customary, by withholding as employee compensation, no additional liability would have been incurred.

The amount now claimed against defendant is in excess of $6,000 and is now due and payable. Wherefore, plaintiff seeks indemnity for all such taxes, state or federal, now assessed, or later to be assessed.

SECOND CAUSE OF ACTION - Impairment of Credit

As a result of the aforesaid tax assessments, as IRS has recorded a lien for $4,966.69 and it has been recorded as a document number 90-111275 by the County Recorder. This lien, even after it is satisfied, remains available to credit rates for seven years. As a direct and proximate result of said recordation, plaintiff has been greatly injured in reputation and it has foreclosed the possibility of credit advances for the period of its recordation.

Wherefore, plaintiff seeks damages in amount to be determined by trial.

EXEMPLARY DAMAGES ATTACHMENT

Beginning in August 1983 and continuing to December, 1990 at Los Angeles, CA. 6922 Hollywood Boulevard, and, 315 West Ninth Street

Description of reason for liability:

Plaintiff is a lawyer and was admitted to practice law in all courts of California in 1982. In August 1983, defendant, a lawyer and a psychologist (M.A. Psychology), hired plaintiff as an Associate in his law practice at an annual salary of only $18,000.00, despite the fact that plaintiff had a prior year of experience in California law, and ten years of prior experience in New Jersey. Defendant knew that plaintiff had been hospitalized for mental and emotional problems. Nonetheless, defendant engaged in a course of conduct which defendant knew, or should have known, would

inflict great mental pain and distress on plaintiff. Such conduct included hiring no less than ten additional attorneys with less experience at salaries greatly in excess of plaintiff's, and by refusing to raise plaintiff's salary to the starting salary of first-year associates in Los Angeles. Defendant alternately promised raises to $30,000, $35,000, $40,000, and $45,000, only to rescind each and every raise at or before it was payable. These practices caused plaintiff great humiliation, mental pain and suffering and caused him to continually seek medical treatment.

Plaintiff incorporates by reference all allegations of the First Cause of Action. Additionally, plaintiff alleges that after several other lawyers left the firm, plaintiff complained that the firm was revolving door. Defendant replied, "You can

stay as long as you want." Thereafter, defendant raised plaintiff's salary to $25,000. But, knowing plaintiff's medical condition, defendant failed to renew the insurance coverage of plaintiff, and failed and neglected to carry plaintiff on his payroll as an employee, paying him instead as an independent contractor. Nonetheless, defendant exercised close personal and professional control over plaintiff, treating him in all respects as an employee. This deprived plaintiff of unemployment and disability coverage he was otherwise entitled to under Unemployment Insurance Code Sections 976, 986, etc. During periods of illness, defendant would require plaintiff to appear at the office and work, paying him not at all in some cases, or by piece in others, and in still others paying him out of funds otherwise due him, terming them advances or loans. Finally, without prior notice, defendant fired plaintiff,

leaving him without recourse to other health and unemployment insurance. Numerous encounters with defendant culminated in his stating, "If you won't give, I will take." Defendant also placed above plaintiff two disbarred lawyers he hired as analysts. Defendant systematically exploited plaintiff, breaching his duty of good faith and fair dealing.

Plaintiff incorporates by reference all allegations of causes First and Second. Defendant engaged in a systematic course of conduct to deprive plaintiff of his rights under the Unemployment Insurance Code, committed fraud by promising raises and continued employment which he did not intend to honor, and by oppressing plaintiff personally and professionally by actions which humiliated plaintiff knowing that it was difficult, if not impossible for plaintiff to find other professional

employment. Defendant paid plaintiff a salary lower than any other attorney, lower than two disbarred attorneys placed over plaintiff, and lower than other non-lawyer employees. In fact, defendant engaged in a course of conduct which resulted in "adjusters" - non-lawyers - receiving a greater salary than plaintiff. All these actions oppressed plaintiff and caused him great shame.

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

10/01/91

Hon. William E. Burby, Jr., Judge

Nature of Proceedings:

Demurrer of defendants Robert Wasserwald and Robert Wasserwald, Inc. to Second Amended Complaint of William J. Cleary, Jr.;

Motion of above to strike punitive damages attachment from plaintiff's second amended complaint:

Demurrer of defendants, Robert Wasserwald and Robert Wasserwald, Inc., to second amended complaint of William J. Cleary, Jr. is granted without leave to amend.

Motion of same to strike is moot.

Moving party is to prepare an order for the court's signature and approval.

Notice is waived.

[FILED
September 25, 1991
James H. Dempsey Clerk
By A. Kunipo Deputy]

William J. Cleary, Jr.
1853 1/2 N. Canyon Drive
Los Angeles, CA. 90028
(213) 465-3633
In Propria Persona

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

William J. Cleary, Jr. Plaintiff,	
vs.	Case No. BC 015585
Robert Wasserwald, et al Defendants	Opposition To Demurrer And To Motion To Strike Date: October 1, 1991 Time: 8:30 A.M. Dept: 24

To Defendant and His Attorneys of Record:

COMES NOW PLAINTIFF WILLIAM J. CLEARY, Jr. who opposes a demurrer and the motion to strike on the grounds that the matters are as clearly pleaded as the facts allow and on

the additional grounds set forth within.

Date: September 25, 1991

William J. Cleary, Jr.

Points and Authorities

I.

Indemnity Arises By Statute and Common Law

The thrust of the defendant's demurrer on the indemnity cause of action is that defendant had no duty to pay plaintiff as an

employee and that, therefore, he is not liable if as an independent contractor plaintiff is assessed retroactive self-employment taxes.

A.

Federal Law

The general rule is that employers must withhold and pay directly to the IRS Federal Income and Social Security (FICA) taxes from the taxable wages paid their employees. IRC Section 3101 - 3102, 3111, 3121, 3401-3404, 3501-3505. This is a matter of common knowledge and common business practice, and the citations seem superfluous.

Furthermore, the employer has a personal liability for 100% of the tax which he fails to withhold. Bloom v. U.S. (9 Cir.) 272 F. 2d 215.

In determining who is an employee, the IRS follows the common law rules.

Anyone who performs service is an

employee if...an employer can control what will be done and how it will be done. This is so even when the employee [has] freedom of action. What matters is ...the legal right to control the method and result of the services.... If an employer-employee relationship exists, it does not matter what it is called. The employee may be called a partner, agent or independent contractor...Circular E. Publication 15, Employer's Tax Guide, December 12, 1990 (IRS Publications). And see, IRS Regs, Section 31.312 (d)-1(C))1).

Furthermore the same circular makes clear that the employer is personally liable for income tax and social security taxes if the employer fails to withhold, deduct and pay the tax simply because the employer, for

reasons of his own, considers the employee a non-employee. Ibid., IRC Section 3509.

The matter has been so well-settled for so long that an associate attorney is an employee of the law firm for which he works that this demurrer cannot be filed in good faith. Indeed, it has been codified, Rev. Rul. 68-324 (1988).

Generally speaking, an associate attorney working for a law firm at a fixed salary who is furnished office space with stenographic help and required to work certain daily hours is an employee, even if the attorney handles certain assigned cases from which he gets the whole fee. See generally, Louisville Evansville & St. Louis R.R. Co. v Wilson, 138 U.S. 501, 505, (1891); accord, Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1925).

But defendants only position here is that he did what the IRS regulations prohibited from doing, i.e. treating an employee as an

independent contractor. It's irrelevant how defendant styles his relationships. The test is the right to control. The law looks past the appearance to regard the reality of the relationship. That is to say, defendant as part of an ongoing pattern of business irregularity (an irregularity admitted as the attachment shows) sought to insulate himself from a personal liability imposed by law and not subject to change. The fact that defendant attaches plaintiff's 1099 (non-employee income) to his moving papers is not determinative, as the quotations above show. The fact that defendant attaches other 1099 forms of employees paid as independent contractors simply shows that the practice was general, i.e. defendant engaged in a pattern of illegal mismanagement.

That this pattern of illegality has resulted in damage to plaintiff can hardly be gainsaid as he has now been assessed

$5,000 in self-employment taxes that never would have been assessed had defendant obeyed the law. These additional taxes are, therefore, defendant's personal responsibility.

B.

California Law

I.

Statute

Labor Code Section 2802 clearly and plainly imposes a duty on the employer to indemnify the employee for all losses incurred by the employee as a direct consequence of the discharge of his duties or of his obedience to the directions of his employer.

The liability imposed by statute makes the voluntary action of the employee irrelevant. It is wrong, then, for defendant to assert that plaintiff is barred

because he continued his employment knowing he was being carried on the books as an independent contractor. One can hardly claim as a defense the acceptance of the conditions of employment, when those very conditions are, as the attachments show, the method of doing business applied to all employees. Whether plaintiff could have obtained employment elsewhere is irrelevant. The statute tacitly assumes that the employee could always refuse to obey his employer and go elsewhere. The point is that if the employee follows the employer's direction and incurs a loss as a result, it is the employer's duty to indemnify the employee for the loss. The employer cannot defend on the ground that the employee could have, in the exercise of his absolute freedom, disobeyed and sought work elsewhere.

II

Common Law

The case law, finally, raises a duty of equitable indemnity where the circumstances warrant. Rossmoor Sanitation, Inc. v. Pylon (1975) 13 Cal. 3d 622, 628.

"The right depends upon the principle that everyone is responsible for the consequences of his own wrong, and if others have been compelled to pay damages which ought to have been paid by the wrongdoer, they may recover from him." Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 74.

It's clear from the law cited above that defendant had a duty imposed by the statute to withhold and pay directly to the IRS all federal and social security taxes for all employees, regardless of how he might regard them. Had defendant followed the law, the present liability of plaintiff would not have been incurred. This liability arises from defendant's wrongdoing, i.e.. failure

to obey the law. In equity and conscience this liability should be his.

III.

The Statute Of Limitations Is Not A Bar

Defendant quotes the statute of limitations conveniently omitting its language that it applies to personal injury, i.e., physical injury. As both underlying claims now do not seek damages for personal injury, the statute by its own terms does not apply.

IV.

The Impairment of Credit Cause Is Valid

Defendant's only defense to this cause of action is that the lien was recorded by the IRS, not by defendant. But it is plain that

defendant is liable for all the damages proximately caused by his wrongdoing. This includes the foreseeable acts of third parties, even if these acts are criminal (which here, of course, they are not.) See, Isaacs v. Huntington Memorial Hospital (1985) 38 Cal 3d 112, 115.

Plainly the recordation of the lien is proximately caused by defendant's failure to obey the tax laws. That the lien was recorded by the IRS is a foreseeable consequence of defendant's violation. He is, accordingly, liable for the effect of the lien on plaintiff's credit, the negative results of which can already be seen. See Exhibit B.

V.

Punitive Damages

Defendant, finally, asserts that there can be no claim for punitive damages absent

"clear and convincing" evidence, and without an underlying cause of action.

But in the first place, the burden of proof at trial does not determine the sufficiency of the allegations of the pleading of a motion to strike. All that be required is that the defendant be given notice of the conduct. This notice is given, and, is bolstered by the attached record of discipline, which is the subject of collateral estoppel, and, which insofar as it was agreed to, has the character of an admission. Exhibit A. It's ludicrous in this context, where the business practices of the defendant have been censored by the State Bar, upon admission, to then dismiss a cause of action for injuries arising from the same employment.

As part of his discipline, defendant is ordered to join the Law Practice Management section of the State Bar, to secure a written evaluation of his office procedures

by a Law Management Consultant to be submitted to his probation monitor at the State Bar Court, provide a list of all open matters, develop and promulgate an office procedure manual, enroll in 3 courses of Law Office Management techniques, file quarterly reports during his one year probation, supporting be affidavit that he has read and complied with the State Bar Act and the rules of Professional Conduct, and shall take and pass Professional Responsibility Examination.

Can defendant now be serious? Does he, in the face of conduct he admitted was wrong and for which he was disciplined, claim now that he doesn't know what he did wrong? A motion to strike does not lie for matters presumptively within defendant's knowledge. Merlin v. WEst Coast Factory (1949) 90 Cal. App 2d 106; Strozier v. Williams (1961) 187 Cal. App. 2d 528.

Furthermore, the first complaint alleges,

the second complaint incorporates by reference, and the third complaint repeats verbatim the actions and patterns of behavior which oppressed plaintiff. These actions, practices and patterns are now the subject of discipline, monitoring and correction by the State Bar itself. As discipline is punishment, can defendant seriously claim that he deserves to be disciplined by the State Bar for his employment practices, but not by an employee who was injured by these same practices?

Defendant was under a duty imposed by law to pay both unemployment and disability insurance payments into the State Insurance Fund to protect his employees. Unemployment Ins. Code Section 675. When plaintiff became ill, an illness exacerbated by defendant's treatment of plaintiff, plaintiff was fired! Plaintiff applied for unemployment benefits and for state disability benefits, and for federal

supplemental security and was told he was ineligible because no monies were paid by his employer into these funds as required by law!

Can defendant seriously maintain that the punitive damage statute does not apply to him? Not only does defendant cause illness but he denied the statutory remedies plaintiff should have had once the illness, and disability, he caused incapacitated plaintiff. Every employer should be on notice if he oppresses his employees and denies them statutory protection by wilful mismanagement which the subject of professional discipline. Defendant's position is wholly ludicrous, disingenuous, and self-serving.

Conclusion

For the foregoing reasons the demurrer and motion should be denied.

September 25, 1991

Respectfully
submitted,

_____
William J. Cleary, Jr.

PUBLIC MATTER

[FILED
Feb. 26, 1991
State Bar Court
Clerk's Office
Los Angeles]

STATE BAR COURT

OF THE STATE BAR OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of

ROBERT WASSERWALD, No. 52880	Case Nos. 87-O-10789ERP
	ORDER APPROVING STIPULATION
Member of State Bar	(FILED FEB. 20 1991)

Pursuant to rule 407, Transitional Rules of Procedure of the State Bar of California, the attached Stipulation as to Facts and Discipline, by and between the Office of Trial Counsel of the State Bar of California, through its Examiners, Janice G. Oehrle and William Klibanow, and Respondent, Robert Wasserwald, appearing through his

counsel, Gert Hirschberg, was submitted and filed with this Court on February 20, 1991. Said stipulation has been fully executed and approved by the parties and is presumed to have been approved by the Chief Trial Counsel of the State Bar pursuant to rule 406, Transitional Rules of Procedure of the State Bar of California. (The Stipulation is attached and incorporated by reference herein.)

I have examined the Stipulation, its admitted facts and proposed disposition. I find that the Stipulation, as modified, is fair to the parties and that the disposition adequately protects the public. I have also examined the effect of the Stipulation, as modified, upon the Client Security Fund and find that it has none. (Rule 407(a), Transitional Rule of Procedure of the State Bar of California.)

Based upon the foregoing, IT IS ORDERED that the attached Stipulation, as

filed February 20, 1991, is approved as to the facts, culpability and discipline set forth therein.

IT IS SO ORDERED.

Dated: February 25, 1991

/s/Ellen R. Peck

Judge of the State Bar Court

PUBLIC MATTER

OFFICE OF TRIAL COUNSEL
STATE BAR OF CALIFORNIA
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[FILED
Feb. 20, 1991
State Bar Court
Clerk's Office
Los Angeles]

STATE BAR COURT

OF THE STATE BAR OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of	
ROBERT WASSERWALD, No. 52880	Case Nos. 87-0-10789ERP and 88-0-11560
Member of State Bar	STIPULATION AS TO FACTS AND DISCIPLINE PURSUANT TO RULES 405-407 OF THE TRANSITIONAL RULES OF PROCEDURE OF THE STATE BAR

IT IS HEREBY STIPULATED by and between the State Bar of California, through its Examiners JANICE G. OEHRLE and WILLIAM KLIBANOW, Respondent ROBERT WASSERWALD, hereinafter "Respondent," and GERT HIRSCHBERG, Respondent Wasserwald's counsel of record, in accordance with Rules 405 through 407 of the Transitional Rules of

Procedure of the State Bar, as follows:

I. JURISDICTION:

The Respondent, ROBERT WASSERWALD, was admitted to the practice of law in the State of California on June 2, 1972 and at all times hereinafter mentioned was and is a member of the State Bar of California.

II. THE FORMAL PROCEEDINGS INVOLVED:

A. A Notice to Show Cause to commence formal proceedings was filed in the above entitled matter on July 9, 1990 and was served upon Respondent through his counsel, Gert K. Hirschberg, by certified mail, return receipt requested, on July 12, 1990. On July 23, 1990, Respondent filed and served his Answer to Notice to Show Cause.

B. It is now the intention of the State Bar and Respondent ROBERT WASSERWALD only to bifurcate and dispose of this matter as it pertains to him by Stipulation as to Facts and Discipline in accordance with

Rules 405 through 407 of the Transitional Rules of Procedure of the State Bar. It is not the intention of the State Bar and/or Respondent Wasserwald to dispose of any issue raised in the aforementioned Notice to Show Cause insofar as it pertains to Respondent Alvin Boatner.

III. WAIVER AND UNDERSTANDING OF THE PARTIES

A. The parties stipulate that this matter may be determined by a hearing judge, pursuant to Rule 407(a) of the Transitional Rules of Procedure of the State Bar.

B. It is understood and acknowledged by the parties to this Stipulation that:

1. Stipulations as to proposed discipline are not binding upon the Supreme Court;

2. This Stipulation as to Facts and Discipline is not effective until approved by a hearing judge and may be disapproved or rejected by the hearing judge; no previous

Stipulation in this matter has been submitted by the parties to the State Bar Court;

3. If approved by the hearing judge, its approving order and the related record of State Bar proceedings shall be filed with the Clerk of the Supreme Court;

4. Once adopted by the hearing judge, the Stipulation shall bind the parties in the proceedings to which it relates unless withdrawn or modified with approval of the judge, upon good cause shown and upon application of a party made within fifteen (15) days of service of the Order approving the Stipulation;

5. Pursuant to Rule 407(d) of the State Bar Transitional Rules of Procedure, if the hearing judge having jurisdiction over this proceeding rejects this Stipulation as to Facts and Discipline, the parties shall be relieved of all effects of the Stipulation and the proceeding shall

resume;

6. Respondent has been advised and stipulates that this Stipulation disposes only of those disciplinary matters specifically addressed herein. Respondent has been advised that there are additional investigation and formal matters which may be pending against him which are not resolved by this Stipulation. If this Stipulation is approved by the hearing judge, the parties waive further hearings only as to those matters specifically addressed herein. Respondent in no way waives his rights to hearing on those matters which are not resolved by this Stipulation.

7. Respondent has been notified of his obligation to pay costs for this disciplinary proceeding as provided for in Business and Professions Code 6086.10 and 6140.7. The amount of costs assessed will be set forth in cost certificates submitted

by the Office of Trial Counsel and State Bar Court upon final review of the matter by the State Bar Court upon final review of the matter by the State Bar Court.

C. Pursuant to Rule 406 of the Transitional Rules of Procedure of the State Bar of California, the Chief Trial Counsel has delegated his authority to approve a Stipulation as to Facts and Discipline in this matter to Examiners JANICE G. OEHRLE and WILLIAM KLIBANOW.

D. The parties hereby waive any variance between the violations alleged in the Notice to Show Cause in this matter and the violations acknowledged in this Stipulation.

IV. STATEMENTS OF ACTS AND OMISSIONS WHICH ARE ADMITTED AND ACKNOWLEDGED BY THE RESPONDENT AS CONSTITUTING CAUSE FOR DISCIPLINE:

A. COUNT ONE (The Arthur Jones Matter)

1. In or about March 1983, Respondent was hired by Arthur Jones to represent him in an asbestos-related personal injury matter against several companies. Immediately thereafter, Respondent assigned the matter for handling to his law partner, Alvin Boatner. On March 22, 1983, Mr. Boatner caused a complaint to be filed on behalf of Mr. Jones in the Los Angeles County Superior Court against Johns Manville and other defendants.

2. Subsequent to March 1983, although claims against some of the defendants were settled, on February 6, 1989, unknown to Mr. Jones at the time, all unresolved claims remaining on that date, except the claim against Johns Manville, were dismissed by the court for failure to timely prosecute. Respondent Wasserwald failed to perform the services for which her was hired by Mr. Jones and/or failed to supervise the performance of services of Mr.

Boatner. Respondent Wasserwald failed to communicate with Mr. Jones and failed to take reasonable steps to avoid foreseeable prejudice to the rights of his client.

B. COUNT TWO

1. In or about October 1983, Respondent was hired by Charles Daniel to represent him in an asbestos related matter. Immediately thereafter, Respondent assigned this matter for handling to his law partner, Alvin Boatner. On October 20, 1983, Mr. Boatner caused a complaint to be filed on Mr. Daniel's behalf in the Los Angeles County Superior Court against the multiple defendants.

2. Subsequent to October 1983, although some Mr. Daniel's claims were settled, on January 4, 1989, unknown to Mr. Daniel, all unresolved claims pending in his behalf as of that date, except the claim against Johns Manville, were dismissed by the Court for failure to bring the matter to

trial within five years from the date of filing.

3. Respondent Wasserwald failed to perform the services for which he was hired by Mr. Daniel and/or failed to supervise the performance of services of Mr. Boatner. Respondent Wasserwald failed to communicate with Mr. Daniel and failed to take reasonable steps to avoid foreseeable prejudice to the rights of his client.

C. COUNT THREE

1. In or about 1983, Respondent was hired to represent Charles Grant in an asbestos-related personal injury matter against multi-defendants, including Raymark Industries. Immediately thereafter, Respondent assigned this matter to his law partner, Alvin Boatner for handling.

2. In or about October 1987, Mr. Grant was advised that a settlement had been reached on his matter with Raymark

Industries. Pursuant to a request from an associate of the Law Offices of Wasserwald and Boatner, Mr. Grant executed releases and returned them to Mr. Boatner.

3. On or about February 19, 1988, a check in the amount of $1,880.67 was received by the Law Offices of Wasserwald and Boatner from Raymark Asbestos Exposure Trust Fund as and for settlement of Mr. Grant's claim against Raymark Industries. Respondent gave the settlement check, which was made payable to Charles Grant only, to his law partner, Alvin Boatner. Thereafter, Respondent failed to take reasonable steps to supervise the disposition of Mr. Grant's funds with the result that Mr. Boatner caused the check belonging to Mr. Grant to be signed and negotiated by a third party without Mr. Grant's knowledge and consent to meet a personal obligation of Mr. Boatner. Respondent had no knowledge that his law partner converted the funds belonging to Mr.

Grant.

4. Between March 1988 and December 1989, Mr. Grant made numerous inquiries concerning the disposition of his funds, including inquiries to Respondent. Respondent failed to communicate with Mr. Grant or respond to his inquiries. After the State Bar intervened, Respondent, from his own funds, made Mr. Grant whole in December 1989.

D. COUNT FOUR

1. In or about 1983, Respondent was hired by Julius Hughes to represent him in an asbestos related matter. Immediately thereafter, Respondent assigned this matter for handling to his law partner, Alvin Boatner. On October 11, 1983, Mr. Boatner caused a complaint to be filed on Mr. Hughes behalf in the Los Angeles County Superior Court against the multiple defendants.

2. Subsequent to October 1983, although some Mr. Hughes claims were

settled, on March 1, 1989, unknown to Mr. Hughes, all unresolved claims pending in his behalf as of that date, except the claim against Johns Manville, were dismissed by the Court for failure to bring the matter to trial within five years from the date of filing.

3. Respondent Wasserwald failed to perform the services for which he was hired by Mr. Hughes and/or failed to supervise the performance of services of Mr. Boatner. Respondent Wasserwald failed to communicate with Mr. Hughes and failed to take reasonable steps to avoid foreseeable prejudice to the rights of his client.

E. COUNT FIVE

1. On or about October 11, 1983, Respondent was hired by Sandra Kenner to represent her in a personal injury matter. On October 11, 1983, Respondent caused a complaint to be filed on behalf of Ms. Kenner in the Los Angeles County Superior

Court against ABC Studios, City of Los Angeles, and other defendants.

2. Subsequent thereto a settlement was reached with defendant ABC Studios. The matter went to trial against the remaining defendants and Ms. Kenner was awarded a judgment against defendant City of Los Angeles.

3. Thereafter, Respondent withdrew from employment and failed to complete the performance of the services for which he was hired, and failed to take reasonable steps to avoid foreseeable prejudice to Ms. Kenner.

F. COUNT SIX

1. In or about August, 1984, Respondent was hired by Tom Bailey to handle a medical malpractice case for him. On or about August 15, 1984, Respondent caused a complaint to be filed in the Los Angeles County Superior Court against various defendants.

2. At the time, and at all times thereafter, Respondent failed to consult with a medical expert and to file a Certificate of Merit, as required by California Code of Civil Procedure section 411.30. As a result of these failures, the defendants brought a motion for summary judgment, which was granted, and the case was dismissed. Respondent thereby failed to perform the services for which he was employed by Mr. Bailey.

G. COUNT SEVEN

1. In or about August 1984, Respondent was hired by Melissa Kimble to handle a personal injury matter on behalf of herself and her daughter. On or about August 2, 1987, a complaint was filed on their behalf on Los Angeles County Superior Court.

2. Subsequent to August 1987, Respondent failed to communicate with Melissa Kimble and failed to respond to her

inquiries concerning the status of her daughter's matter. He failed to complete the performance of the services for which he was hired.

H. COUNT EIGHT

1. On or about September 17, 1985, Respondent was hired by Irene Mayer to represent her in a personal injury matter, in place and stead of her prior attorney. On or about March 27, 1986, Respondent caused a complaint to be filed in the Los Angeles County Superior Court against various defendants. Respondent's, was assigned an associate attorney working in his office to the case.

2. An arbitration hearing was scheduled for July 13, 1988. Prior thereto, Ms. Meyer repeatedly attempted to contact Respondent regarding the arbitration but Respondent did not return her calls. On or about July 13, 1988, Respondent spoke to Ms. Meyer and advised her that the arbitration

would be postponed and that she should not attend at that time. As a consequence, Ms. Meyer did not attend the arbitration.

3. On July 13, 1988, on the date set for the arbitration on this matter, Respondent was contacted by the office of the assigned arbitrator in the case. At that time, Respondent advised the arbitrator's office that a representative from Respondent's office would be appearing at the arbitration. In fact, neither Respondent nor anyone from Respondent's office appeared at the arbitration and an award was given in favor of the defendants in the case. Respondent's associate thereafter field for a Trial de Novo. The matter was settled just before trial and Ms. Meyer received funds pursuant to that settlement.

4. Respondent thereby failed to perform the services for which he was employed and/or failed to supervise the

conduct of the associate to whom the case was assigned by Respondent. Respondent failed to communicate with Ms. Meyer or to respond to her inquiries regarding her case.

I. COUNT NINE

1. On or about July 3, 1986, Respondent was hired by Sheila Henderson to represent her daughters and her aunt in a personal injury matter. Subsequent to July 3, 1986, Respondent failed to perform the services for which he was hired by Ms. Henderson, failed to take reasonable steps to avoid foreseeable prejudice to the rights of his clients, failed to communicate with Ms. Henderson and respond to her inquiries and failed to comply with her request to forward her file to her new counsel after her was discharged as her attorney.

J. COUNT TEN

1. On or about July 9, 1986, Respondent was employed by Ralph Wade for the handling of a personal injury case.

Respondent referred Mr. Wade to the offices of Allan Bass, another attorney, for the handling of a related Worker's Compensation case.

2. Thereafter, Respondent failed to file a complaint within the required period and the personal injury case could not be prosecuted further. Respondent failed to take reasonable steps to avoid foreseeable prejudice to the rights of Mr. Wade.

3. Respondent failed to communicate with Mr. Wade despite his numerous attempts to contact the Respondent. Further Respondent failed to advise Mr. Wade that he had missed the statutory filing date until approximately September 1987. At that time, Respondent admitted to Mr. Wade that he had failed to file a complaint on his behalf and requested that Mr. Wade sign a general release releasing him from any liability to Mr. Wade in exchange for the payment of a specified sum of money. Respondent did not

allow Mr. Wade an opportunity to review the release with the assistance of an independent attorney before executing the document.

K. COUNT ELEVEN

1. In or about August 1986, Respondent was hired by Gene Sokol to represent him in a personal injury matter. Thereafter, in April 1987, Mr. Sokol terminated Respondent's employment and hired new counsel. Even though requested to do so, Respondent failed to deliver Mr. Sokol's file to his new attorney.

L. COUNT TWELVE

1. In or about September, 1986, Respondent was hired by Sheba Morales to represent her in a personal injury case. Thereafter, Respondent failed to file a complaint within the appropriate statutory period, thereby failing to perform the services for which he was hired and failing to avoid foreseeable prejudice to the rights

of Mr. Morales.

M. COUNT THIRTEEN

1. In or about June 1987, Respondent was hired by Nathaniel Bush to represent him in a personal injury case. Thereafter, the case was primarily assigned to Respondent's associate for handling.

2. Subsequent to June 1987, Respondent failed to perform all of the services for which he was hired by Nathaniel Bush and/or failed to supervise the services performed by his associate. Respondent failed to communicate with Bush and respond to his inquired concerning the status of his case.

N. COUNT FOURTEEN

1. On or about September 20, 1986, Respondent was hired by Burnette Manning for the handling of a personal injury case. Thereafter, Respondent failed to perform the services for which he was retained and failed to take reasonable steps to avoid

foreseeable prejudice to the rights of his client.

2. Subsequent to September 1986, Ms. Manning terminated Respondent's employment and employed attorney William Hayes as new counsel in the matter. Attorney Hayes requested that Respondent deliver the case to him but Respondent failed to do so.

O. COUNT FIFTEEN

1. On or about January 28, 1987, Respondent was hired by Myron Hale to handle a personal injury matter. Thereafter, Respondent failed to communicate with Mr. Hale and respond to his inquiries concerning the status of his matter.

2. In April 1987, Mr. Hale terminated Respondent's services and hired new counsel. Thereafter, Respondent failed to comply with the request of Mr. Hale's new counsel to deliver his file to him.

V. LEGAL CONCLUSIONS

A. Count One

1. In failing to perform the services for which he was hired by Arthur Jones and/or failing to supervise the performance of said services, Respondent wilfully violated former Rules of Professional Conduct 6-101(2) and 6-101(A)(2).

2. In failing to commuicate with Mr. Jones and failure to advise him that his unresolved claims had been dismissed, Respondent wilfully violated Business and Professions Code 6068(m).

3. In failing to take reasonable steps to avoid foreseeable prejudice to Mr. Jones rights, Respondent wilfully violated former Rule of Professional Conduct 2-111(A)(2).

B. COUNT TWO

1. In failing to perform the services for which he was hired by Charles Daniel and/or failing to supervise the performance of said services, Respondent

Wasserwald wilfully violated former Rules of Professional Conduct 6-101(A)(2).

2. In failing to communicate with Mr. Daniel and failure to advise him that his unresolved claims had been dismissed, Respondent wilfully violated Business and Professions Code 6068(m).

3. In failing to take reasonable steps to avoid foreseeable prejudice to Mr. Daniel's rights, Respondent wilfully violated former Rule of Professional Conduct 2-111(A)(2).

C. COUNT THREE

1. In failing to perform the services for which he was hired by Mr. Grant and/or failing to supervise the performance of said services, and in failing to communicate with Mr. Grant and respond to his inquiries concerning the disposition of his settlement monies until such time as the State Bar intervened, Respondent Wasserwald wilfully violated Business and Professions

Code Section 6068(m) and former Rules of Professional Conduct 6-101(A)(2).

D. COUNT FOUR

1. In failing to perform the services for which he was hired by Julius Hughes and/or failing to supervise the performance of said services, Respondent Wasserwald wilfully violated former Rules of Professional Conduct 6-101(A)(2).

2. In failing to communicate with Mr. Hughes, in failing to respond to his inquiries and in failing to advise him that his unresolved claims had been dismissed, Respondent wilfully violated Business and Professions Code 6068(m).

3. In failing to take reasonable steps to avoid foreseeable prejudice to Mr. Hughes rights, Respondent wilfully violated former Rule of Professional Conduct 2-111(A)(2).

E. COUNT FIVE

1. In failing to complete the

performance of services in which he was hired by Sandra Kenner and in withdrawing from employment without taking reasonable steps to avoid foreseeable prejudice to Ms. Kenner, Respondent wilfully violated former Rules of Professional Conduct 2-111(A)(2) and 6-101(A)(2).

F. COUNT SIX

1. In failing to perform the services for which he was hired by Tom Bailey, Respondent wilfully violated former Rules of Professional Conduct 6-101(A)(2).

2. In failing to consult with a medical expert regarding the case and to file a Certificate of Merit, as required by Code of Civil Procedure section 411.30, Respondent wilfully violated California Business and Professions Code sections 6068(a) and 6103.

F. COUNT SEVEN

1. In failing to communicate with Ms. Kimble and respond to her inquiries and

in failing to perform all of the services for which he was hired, Respondent wilfully violated former Rule of Professional 6-101(A)(2).

G. COUNT EIGHT

1. In failing to perform the services for which he was hired by Ms. Meyer, Respondent wilfully violated former Rule of Professional 6-101(A)(2).

2. In failing to communicate with Ms. Meyer and respond to her inquiries, Respondent wilfully violated Business and Professions Code 6068(m).

I. COUNT NINE

1. In failing to perform the services for which he was hired by Ms. Henderson, Respondent wilfully violated former Rule of Professional 6-101(A)(2).

2. In failing to take reasonable steps to avoid foreseeable prejudice to the rights of his clients in this matter and in failing to release Ms. Henderson's file to

her new counsel upon being requested to do so, Respondent wilfully violated former Rule of Professional Conduct 2-111(m).

3. In failing to communicate with Ms. Henderson and respond to her inquiries, Respondent wilfully violated Business and Professions Code 6068(m).

J. COUNT TEN

1. In failing to perform the services for which he was hired by Ralph Wade and in failing to take reasonable steps to avoid foreseeable prejudice to Mr. Wade, Respondent wilfully violated former Rules of Professional Conduct 2-111(A)(2) and 6-101(A)(2).

2. In failing to communicate with Mr. Wade and respond to his inquiries, Respondent wilfully violated Business and Professions Code 6068(m).

3. In entering into an agreement with Mr. Wade to limit his liability to Mr. Wade for his personal malpractice, and in

doing so without giving Mr. Wade a reasonable opportunity to seek the advice of independent counsel, Respondent wilfully violated former Rules of Professional Conduct 5-101 and 6-102.

K. COUNT ELEVEN

1. In failing to deliver Mr. Sokol's file to Mr. Sokol's new counsel after being requested to do so, Respondent wilfully violated former Rule of Professional Conduct 2-111(A)(2).

L. COUNT TWELVE

In failing to perform the services for which he was employed, and in withdrawing from employment without taking reasonable steps to avoid foreseeable prejudice to Ms. Morales, Respondent wilfully violated former Rules of Professional Conduct 2-111(A)(2) and 6-101(A)(2).

M. COUNT THIRTEEN

1. In failing to perform the

services for which he was hired by Nathaniel Bush and/or failing to supervise the performance of said services, and in failing to communicate with Mr. Bush, Respondent Wasserwald wilfully violated former Rules of Professional Conduct 6-101(A)(2).

N. COUNT FOURTEEN

1. In failing to perform the services for which he was employed by Burnette Manning, in failing to take reasonable steps to avoid foreseeable prejudice to her rights, and in failing to deliver the case file to her new counsel when requested, Respondent wilfully violated former Rules of Professional Conduct 2-111(A)(2) and 6-101(A)(2).

O. COUNT FIFTEEN

1. In failing to communicate with Mr. Hale and respond to his inquiries concerning the status of his matter, Respondent wilfully violated former Rules of Professional Conduct (6-101(A)(2).

2. In failing to release Mr. Hale's file to Mr. Hale's new counsel after being requested to do so, Respondent wilfully violated former Rule of Professional Conduct 2-111(A)(2).

VI. STATEMENT OF MITIGATING CIRCUMSTANCES:

A. Respondent has been candid and cooperative with the State Bar during these disciplinary proceedings.

B. Attached hereto and marked as Exhibit "A" is Respondent's detailed statement submitted in explanation of his misconduct.

C. Respondent was admitted to the practice of law in the State of California on June 2, 1972. He has no prior record of discipline.

D. With regard to Count Thirteen, Nathaniel Bush, Respondent's client therein, received all of the funds to which he was entitled.

VII. STATEMENT OF AGGRAVATING CIRCUMSTANCES:

A. The current misconduct acknowledged by Respondent evidences multiple acts of wrongdoing.

B. In some instances, the misconduct acknowledged by Respondent caused some harm to his clients.

VIII. RECOMMENDED STIPULATED DISCIPLINE

It is hereby recommended that Respondent be suspended from the practice of law in the State of California for a period of one year; that execution of the Order for such suspension be stayed; and the Respondent be placed on probation for a period of three years on the following terms and conditions:

A. During the period of probation, Respondent shall comply with the provision of the State Bar Act and Rules of Professional Conduct of the State Bar of California.

B. Respondent shall, within thirty (30) days after the effective date this Stipulation, join the Law Practice Management section of the State Bar of California and shall pay whatever dues and costs are associated with such enrollment.

C. Respondent shall, within forty-five (45) days after the effective date of this stipulation and at his own expense, secure a written evaluation of his office procedures by a Law Practice Management Consultant chosen by the Office of Trial Counsel and provide a copy of same to the Probation Monitor appointed pursuant to provision VIII.H of this Stipulation. Said evaluation shall assess Respondent's caseload management techniques, calendar management techniques and general office management and supervisory practices with a view toward outlining in detail, any areas where deficiencies exist and where techniques for improvement may be

implemented. Accompanying said evaluation shall be a complete list of open client files being maintained by Respondent and any associate attorneys who work for Respondent and said list shall specify the following:

1. name of client;

2. date Respondent was hired;

3. nature of employment; and

4. current case status, including the names of the attorney primarily responsible in the case and the dates on which ongoing review of case was conducted by Respondent.

D. Respondent shall, in conjunction with the Law Practice Management Consultant, and within sixty days after the effective date of this Stipulation, develop and promulgate an office procedure manual for use in his law practice. Respondent shall certify to his Probation Monitor in writing that said manual has been developed and is in use in his office.

E. Respondent shall, with each quarterly report he is required to furnish pursuant to the terms of this Stipulation, report, in writing, to his Probation Monitor, the method by which any law office management techniques suggested by the consultant have been implemented by Respondent, the results of said implementation, a list of any and all new matters on which Respondent was hired during the previous month including the points specified in VIII.C. above and a case by case status update.

F. Within one year of the effective date of this Stipulation, Respondent shall enroll in and complete no fewer than three (3) courses in Law Office Management Techniques specifically dealing with any area of deficiency noted in the aforementioned evaluation and including but not limited to, a course in trust account management, general office management and

personnel supervisory techniques. Respondent shall certify to his Probation Monitor that he has taken said courses within thirty (30) days of completion of same and shall provide the name of each course, the name of the entity offering the course, the location where he attended the course, the name of the course instructor and the number of classroom hours he attended.

G. During the period of probation, Respondent shall file written reports no later than January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect, with the Probation Department of the State Bar Court, State Bar of California at Los Angeles. Each report shall state that it covers the preceding calendar quarter or applicable portion thereof, and shall be certified by affidavit or executed under penalty of perjury. If the effective date

of probation is less than thirty (30) days preceding any of the reporting dates indicated above, Respondent shall file Respondent's first report on the second reporting date following the effective date of probation.

1. In Respondent's first and in each subsequent report, Respondent shall certify that he has read and complied with all conditions of probation stated herein during said period.

2. Respondent's final report shall be filed covering the remaining portion of probation following the last report required by the foregoing provisions of VIII.E and VIII.G. above.

H. Respondent shall be referred to the Department of Probation, State Bar Court, for assignment of a Probation Monitor. Respondent shall promptly review the terms and conditions of Respondent's probation with the Probation Monitor to

establish a manner and schedule of compliance. During the period of probation, Respondent shall furnish, in addition to the reports set forth in Section VIII.E and VIII.G above, such reports concerning Respondent's compliance as may be requested by the Probation Monitor. Respondent shall cooperate fully with the Probation Monitor to enable him/her to discharge his/her duties pursuant to Rule 611, Transitional Rules of Procedure of the State Bar.

I. During the period of probation, Respondent shall maintain at the Los Angeles Office of the State Bar Court, his current office or other address for State Bar membership purposes as well as his current addresses. Within ten days of any change of the aforementioned addresses, Respondent shall notify the Los Angeles Office of the State Bar Court of said changes in writing.

J. Except to the extent prohibited by the attorney-client privilege and the

privilege against self-incrimination, Respondent shall answer fully, promptly and truthfully all inquiries directed to him personally or in writing by the State Bar Office of Trial Counsel or by the Presiding Judge of the State Bar Court or his/her designee.

K. The period of probation shall commence as of the date on which the Order of the Supreme Court herein becomes effective and shall continue for a period of one year.

L. At the expiration of said probation period, if Respondent has complied with the terms of probation, said Order of the Supreme Court suspending Respondent from the practice of law for a period of one (1) year shall be satisfied and the suspension shall be terminated.

M. Within thirty (30) days of the effective date of this Stipulation, Respondent shall execute a Substitution of

Attorney form, substituting "Sandra Kenner, in propria persona," or some other attorney of Sandra Kenner's choice, in Respondent's place and stead as attorney of record for Plaintiff in the case of Sandra Kenner v. City of Los Angeles, et al., case no. C 562 055. Respondent shall waive recovery of any and all attorney's fees and/or costs incurred in said case.

Further, pursuant to Stipulation it is recommended that the Supreme Court order that Respondent take and pass the California Professional Responsibility Examination administered by the Committee of Bar Examiners of the State Bar of California, within one year from the date upon which the order of the Supreme Court herein becomes effective and furnish satisfactory evidence to the Probation Department of the State Bar Court of successful completion of the examination.

The office of Trial Counsel of the

State Bar and the Respondent stipulate that the afore-recommended discipline is based upon the finding of the State Bar that protection of the public and the interests of the attorney shall be served thereby.

OFFICE OF TRIAL COUNSEL

STATE BAR OF CALIFORNIA

DATE: 2/19, 1991

___[signed]_____
JANICE G. OEHRLE
Co-Examiner

DATE: 2/19, 1991

___[signed]_____
WILLIAM KLIBANOW
Co-Examiner

DATE: 2/13, 1991

___[signed]_____
ROBERT WASSERWALD
Respondent

DATE: 2/13, 1991

_____[signed]_____
GERT K. HIRSCHBERG
Attorney for Respondent

[Certificate] This document to which this certificate is attached consisting of 25 pages, is a full, true and correct copy of the original on file and of record in my

office.

ATTEST Sept. 16, 1991
Judy V. Duffield, Manager, Office
of the Clerk, State Bar Court,
State Bar of California,
Los Angeles,

By [signed] Angela Owens, Deputy